DOCUMENT RESUME

ED 282 321 EA 019 416

AUTHOR Cohen, Abby J.
TITLE School-Age Child Care: A Legal Manual for Public School Administrators.
INSTITUTION Wellesley Coll., Mass. Center for Research on Women.
SPONS AGENCY Carnegie Corp. of New York, N.Y.; Ford Foundation, New York, N.Y.
PUB DATE 84
NOTE 115p.
AVAILABLE FROM Publication Sales, Wellesley College, Center for Research on Women, Wellesley, MA 02181 ($25.00).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Guides - Non-Classroom Use (055)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Childhood Needs; *Day Care; Elementary Secondary Education; *Latchkey Children; Legal Problems; *Legal Responsibility; *Public Schools; *School Age Day Care; School Community Relationship; State Legislation

ABSTRACT

Current national concern about increasing numbers of latchkey children has been addressed by policy initiatives at the federal, state, and local levels. Educators in many communities are examining what schools can do for children when classes are not in session and parents and other caregivers are unavailable. This manual confronts the legal issues involved when schools collaborate with community groups to use school space or initiate their own school-age day care programs. Chapter 1 discusses legal authorization or "enabling" considerations found in state education codes or statutes that enumerate powers of school boards and uses of school property. Chapter 2 stresses the need for school board resolutions based on sound needs assessments and space utilization surveys. Chapter 3 details regulatory considerations governing types of care, staff ratios, compliance, programming, and enforcement aspects of school-age day care. The fourth chapter discusses liability issues, particularly standards of care, while the fifth chapter treats services for handicapped children and their parents. The last three chapters address antitrust/unfair competition, staffing, guidelines, and written agreements involving rent, leases, and contracts. Included are appendices containing model enabling statutes and resolutions, guidelines, and a checklist of areas of concern. Numerous references appear at the end of each chapter. (MLH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

Michelle Seligson

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

SCHOOL-AGE CHILD CARE
A LEGAL MANUAL
for Public School Administrators

ED282321

Abby J. Cohen, Esq.
Child Care Law Center

EA 019 416

A Publication of the School-Age Child Care Project, Wellesley College Center for Research on Women, Wellesley, Massachusetts 02181

A MANUAL FOR PUBLIC SCHOOL ADMINISTRATORS:

LEGAL CONSIDERATIONS FOR THE IMPLEMENTATION

OF SCHOOL-AGE CHILD CARE

by Abby J. Cohen, Esq.
Child Care Law Center

A Publication of the School-Age Child Care Project, Wellesley College Center for Research on Women, Wellesley, Massachusetts 02181

This Manual was prepared with the support of the Carnegie Corporation of New York and the Ford Foundation. The statements, findings, conclusions, and recommendations included herein do not necessarily reflect the views of the sponsoring institutions.

Copyright 1984 by School-Age Child Care Project and Child Care Law Center. All rights reserved. No part of this publication may be reproduced, translated, or transmitted in any form or by any means without permission in writing from:

School-Age Child Care Project
Wellesley College
Center for Research on Women
Wellesley, MA 02181

and

Child Care Law Center
Suite 815
625 Market Street
San Francisco, CA 94105

Printed in the United States of America.

PREFACE

The idea to research and write a legal manual for school administrators on the implementation of school-age child care programs in the public schools grew out of discussions I had with Kathleen Murray, formerly the senior staff attorney of the San Francisco-based Child Care Law Center. Legal questions concerning the use of public schools for child care had been surfacing steadily from the time the Wellesley School-Age Child Care Project began its research in 1979. The Carnegie Corporation and the Ford Foundation saw the importance of funding legal research as a counterpart to the other activities of the SACC Project, and in 1982, attorney Abby Cohen of the Child Care Law Project assumed the major task of analyzing data already collected, initiating additional research, and writing the manual. At the suggestion of Pat Martin at the Council of Chief State School Officers in Washington, D.C., we designed a memo addressed to the fifty chief state school officers requesting information on state laws, codes, and other statutory evidence which spoke to the use of public schools for child care. This "electronic letter" was sent out by the Council of Chief State School Officers to its membership and shortly we received data from a number of states which proved immensely helpful in the compilation of this book.

Current national concern about the increase in numbers of "latchkey" children has recently been addressed by policy initiatives at the federal, state, and local level. Federal legislation was proposed in 1983 by Senators Donald Riegle (D-MI) and Claiborne Pell (D-RI). The bill, the "School Facilities Child Care Act," was introduced into the U.S. House of Representatives as H.R. 4193, and in May, 1984, was unanimously passed by the House membership. In 1984, the Administration for Children, Youth, and Families (U.S. Department of Health and Human Services) will begin to administer some funds specially targeted for school-age child care programs. And at the state and local level, policymakers are developing legislative and programmatic responses to the need for more school-age child care.

Most of this activity focuses on the use of available public school facilities as a logical locus for school-age child care programs, and reflects actual practice at the local level. In communities across the United States, school administrators and officials are examining ways in which the schools can participate in solving the problem faced by so many families--what to do for children when school is not in session and parents or other caregivers are not available? Many schools have entered into collaborative agreements with community groups and agencies to use school space; some school districts and individual schools prefer to run their own programs. Whatever the administrative model, it is clear that schools are going to be more and more involved as American families turn to their communities for help with their child care needs. It is equally clear that this involvement can only proceed within a carefully delineated legal framework.

The School-Age Child Care Project was initiated in 1979 as an action research effort aimed at learning just how communities were providing for the child care needs of young school-age children aged five to twelve. As we learned more about the creative solutions developing at the local level, and as we began to understand some of the policy and operational problems that accompanied this development, the Project was able to offer information and technical assistance to many individuals and organizations. An action research project has the opportunity to both observe and participate in events, and the School-Age Child Care Project was uniquely designed to do both. For example, our early research informed us that while many public school administrators were interested in allowing community groups and agencies to use public school space for before- and after-school child care, for some administrators the absence of school board policy left too many unanswered questions, and thus tended to inhibit further action. Similarly, school board members who wished to involve their schools in providing child care were uncomfortable when state education laws provided no assurances that schools were in fact permitted to do so. Between 1982 and 1983, the School-Age Child Care Project published two books on school-age child care, School-Age Child Care: An Action Manual (Auburn House Publishing Company, Boston, 1982) and School-Age Child Care: A Policy Report (Wellesley, 1983). These publications included sections that were addressed specifically to problem areas that arise when

school administrators begin to consider ways in which school resources can be used for school-age child care. But the Legal Manual addresses the legal parameters of school-based child care exclusively; we are concerned in this publication with the questions and concerns expressed by school administrators and officials, and have provided the most reliable answers currently available. However, we think that this Manual will also be helpful as a companion piece to the Action Manual and the Policy Report for parent groups, social service agencies, and advocacy organizations in their efforts to establish school-based programs.

Michelle Seligson, Director
School-Age Child Care Project
Wellesley College
Center for Research on Women
Wellesley, Massachusetts 02181
July 1984

ACKNOWLEDGMENTS

When a project is in preparation over a period of months as this one was, it is difficult if not impossible to acknowledge all those who played a part in its development. This is true not only because the contributors are so numerous, but also because many of the contributions were indirect, intangible and in some cases, now unattributable. Nevertheless, special thanks are owed to:

The Child Care Law Center legal staff, including Kathleen Murray for her identification of the legal issues involved and preliminary research, Carol Stevenson for her continuous contributions of legal and practical advice, and Christine Brigagliano for her helpful review of early drafts; to Lorraine Allen and Heidi Winkler for their typing, retyping and patience; to Marcia Rosen, Esq. of the San Francisco Lawyers' Committee for Urban Affairs for her ever-sharp legal mind; to the Wellesley School-Age Child Care Project, especially Michelle Seligson, who saw the need and provided continuing guidance; Marcy Whitebook of the Child Care Staff Education Project; Judy Calder, BANANAS; Kay Lucas-Wallace, Esq.; Andrew Scott, Children's Council, San Francisco; Arlene Mayerson, Esq., Disability Rights Education and Defense Fund; and of course, to the Carnegie Corporation which provided the financial assistance to make this undertaking possible.

Finally, a special thanks to all the people engaged in school-age child care who have not waited for the instruction manuals but who have simply put their energies into developing positive environments to meet children's and parents' needs.

Abby J. Cohen, Esq.
Child Care Law Center
625 Market Street, Suite 815
San Francisco, California 94105
June 1984

"O, sir!" said Toad, crying afresh, "I am a poor unhappy washerwoman, and I've lost all my money, and can't pay for a ticket, and I must get home to-night somehow, and whatever I am to do I don't know. O dear, O dear!

"That's a bad business, indeed," said the engine-driver reflectively. "Lost your money -- and can't get home -- and got some kids, too, waiting for you, I dare say?"

"Any amount of 'em," sobbed Toad. "And they'll be hungry -- and playing with matches -- and upsetting lamps, the little innocents! -- and quarrelling, and going on generally. O dear, O dear!"

--Kenneth Grahame, The Wind In the Willows (New York, Charles Scribner's Sons, 1953), p. 147.

INTRODUCTION

It is conservatively estimated that each day six million young children throughout the United States return to an empty home after school. Many youngsters also wake up in an empty home, preparing for school without adult supervision. There are a myriad of reasons for this growing problem. They include: 1) dramatic increases in labor force participation by mothers with young children;[1] 2) rising numbers of female-headed households[2] whose problems generally are compounded by low wages[3] and lack of child support;[4] 3) the demise of extended families and nearby relatives and neighbors who can be called upon to provide child care; 4) the elimination or reduction of recreational programs traditionally provided by public agencies; and 5) the expense and lack of age-appropriate school-age child care (SACC).

The risks involved in self-care depend on the individual child and the character of the environment he or she returns home to. According to Professor James Garbarino, the risks include "feeling badly (e.g., rejected, afraid and lonely), acting badly (e.g., victimizing younger siblings, engaging in destructive behavior inside and outside the home), developing badly (e.g., having school adjustment problems, developing negative feelings about parents), and being treated badly (e.g., suffering accidents and sexual victimization)."[5] For a small number of children the consequences of being left alone are very serious; they may face severe injury or death. For the greater number of children, the consequences may now appear to be less serious, but the long-term consequences are likely to prove to be profound, since these children are being left alone during a formative stage of their development.

Happily, many concerned persons are devoting their efforts toward the elimination of this problem. Models now exist which demonstrate how school-age children can be cared for in secure and age-appropriate environments during those hours when their parents are unable to care for them. One of the most promising solutions has been the development of school participation in the delivery of child care, either through school-operated programs or through the leasing of school space to community-based programs.

Fears about legal responsibilities, both real and imagined, plague many school administrators considering the implementation of SACC in their schools. This Manual is intended to allay those fears by identifying the primary legal areas of concern and suggesting ways to minimize legal problems.

A Caveat

No manual, however thoughtfully prepared -- this one included -- can:

1. Answer all legal questions definitively, particularly given the rapid changes and the undeveloped state of this area of the law;

2. Provide absolute assurance of protection from legal claims; or

3. Substitute for the individualized advice of a lawyer familiar with the specific problems a particular school may face and who has the most up-to-date information on current law.

Nevertheless, it is hoped that this Manual can serve as a resource to school administrators and others who seek a general review of the legal considerations related to the implementation of SACC in the schools. Ultimately, the worth of the manual will be demonstrated by how well it succeeds in encouraging the development of greater options in the provision of child care for the school-age child.

INTRODUCTION

FOOTNOTES

[1]"U.S. Children and Their Families: Current Conditions and Recent Trends," Select Committee on Children, Youth and Families, House of Representatives, 1983, p. 13.

[2]"U.S. Children and Their Families: Current Conditions and Recent Trends," Select Committee on Children, Youth and Families, House of Representatives, 1983, p. 6, p. 10.

[3]"Feminization of Poverty," a report prepared by the California Assembly Human Services Staff, April 8, 1983, p. 4.

[4]"Child Support Frequently Not Paid," New York Times, July 8, 1983; U.S. Children, above, p. 20.

[5]James Garbarino, "Latchkey Children: Getting the Short End of the Stick?" Vital Issues, November 1980, vol. xxx, no. 3.

TABLE OF CONTENTS

CHAPTER 1
Legal Authorization or "Enabling" Considerations 1

CHAPTER 2
School Board Resolution Considerations 11

CHAPTER 3
Regulatory Considerations 17

CHAPTER 4
Liability Considerations 26

CHAPTER 5
Special Needs Considerations 44

CHAPTER 6
Antitrust/Unfair Competition and Related Considerations 54

CHAPTER 7
Staffing Considerations 59

CHAPTER 8
Rental Agreement/Lease/Contract Considerations 67

APPENDIX A
Model School-Age Child Care Enabling Statute 70

APPENDIX B
Model School Board Resolution: School-Age Child Care Programs in Public School Facilities 73

APPENDIX C
An Example of Guidelines for the Operation of SACC Programs within Public Schools by Independent Groups 76

APPENDIX D
A Checklist: Areas of Concern for Schools and SACC Programs 80

APPENDIX E
Sample Lease 95

BIBLIOGRAPHY 100

CHAPTER 1

LEGAL AUTHORIZATION OR "ENABLING" CONSIDERATIONS

> The powers of school boards are limited to those expressly granted, necessarily implied, or essential and indispensable to the functions of such board.
>
> Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E. 2d 30 (1977).

Public schools have long acknowledged a responsibility for ensuring that school children in their communities are adequately cared for during nonschool hours. As early as 1932, the Utah Supreme Court declared:

> It is the aim of modern educators to expand the educational system so as to keep the interest and employ the energy of school children during their leisure time, and in this way prevent children from getting into mischief and becoming law violators. These (recreational activities) are useful and wholesome preventive measures which save children from delinquency and the state from additional expense . . . By these enactments the Legislature has enlarged the scope of an educational program which the state may furnish to its citizens, both children and adults, and has opened the door of opportunity to the boards of education of the several school districts for the widest possible use of public school property in the interest of community development.
>
> Beard v. Bd. of Ed., 16 P.2d 900 at 904 (Utah, 1932).

Today, this need is even greater. More public schools have begun to review how they can play a role in meeting the needs of the growing number of children requiring care when school is not in session. Once the need for school-age child care

programs is established,* schools have a number of options available to them. The three primary options include:

-- Establishing a school-operated program;

-- Contracting with or leasing space to an outside group such as the YMCA, Girls Club, or parent organization to provide child care. The degree of control exercised by the schools over these programs may vary widely. The relationship between the school and the program may range from that of a traditional lessor-lessee, to school participation in the hiring of staff, in the programming, etc.

-- Providing financial or in-kind assistance to existing programs within the community, such as transporting children from school grounds to after-school programs operating elsewhere in the community, granting use of specific recreational facilities, instructional materials or resources, etc.

The availability of these options will be determined in part by what activities a school is legally empowered to undertake. As of this date, relatively few schools have been subjected to lawsuits challenging their authority to operate SACC programs, but such lawsuits have been filed.[1] While none of these lawsuits has been successful, they reinforce the importance of reviewing state "enabling" legislation and any pertinent regulations prior to public school participation in school-age child care programs. Careful review of these statutes and operation within their scope will minimize the likelihood of a successful legal challenge to public school participation in the provision of child care.

*See School-Age Child Care: An Action Manual, (Boston: Auburn House House Publishing Co., 1982) chapter 2.

WHAT IS "ENABLING" LEGISLATION?

A fundamental doctrine governing the activities of school boards[2] is that they are created by state law and have only those powers specifically granted and enumerated by statute.[3] "Enabling" legislation is the law or group of laws which authorize school boards to engage in certain activities. For purposes of this discussion, enabling legislation is the law or laws which directly or indirectly bear on the ability of public schools to operate school-age child care programs.

WHERE IS ENABLING LEGISLATION FOUND?

While enabling legislation varies from state to state, there are a few types of laws to look for which will delineate the school's power to become involved in school-age child care. They usually appear in the state's "education" or "school" code. In certain states which have exceptionally detailed constitutions, it will be important to check the constitution as well.[4] Some states may have only one type of law, others two, and a few will have three or more laws which bear on the school's ability to participate in the provision of school-age child care.

General Powers and Duties of School Boards: Most states will have a statute (law) which enumerates the general powers and duties of school boards. While not addressing the issue of school-age child care directly, these statutes often suffice, in the absence of more specific legislation, as authority for schools to operate programs or lease school facilities. However, their very vagueness and ambiguity leaves them open to interpretation. This may be highly disadvantageous if SACC programs are challenged in court, for the judiciary is then given greater latitude in determining whether the school's participation in SACC programs is authorized.

A good example of such a general powers and duties statute is found in Sec. 37-7-301 of the Mississippi Education Code, which provides in pertinent part:

> The boards of trustees of school districts shall have the following powers, authority, and duties in addition

to all others imposed or granted by law, to wit:
. . .

(k) To authorize the use of the school buildings and grounds for the holding of public meetings and gatherings of the people under such regulations as may be prescribed by said board;

* * *

(r) To provide and regulate athletic programs and other school activities;

* * *

(t) To expend local school activity funds, or other available school district funds, other than minimum education program funds, for the purposes prescribed in this paragraph.

"Activity funds" shall mean all funds received by school officials in all school districts paid or collected to participate in any school activity, such activity being part of the school program and partially financed with public funds or supplemented by public funds . . . The local school governing board shall be authorized and empowered to promulgate rules and regulations specifically designating for what purposes school activity funds may be expended . . ."

Without defining what constitutes public "gatherings," "school activities" or "school program," the statute leaves open the question of whether a court would find legal authority here for a school district to operate a SACC program.

Specific Legislation Respecting the Use of School Property: Another type of statute which appears in most but not all state school or education codes provides for the use of school property for "other than school purposes." It is very important to review these statutes carefully. They may provide broad grants of authority which enable school districts to operate and/or make space available to outside groups for school-age child care programs. However, they may also restrict use to certain purposes, to certain times (perhaps excluding the possibility of joint occupancy) and to certain groups.

Ohio provides a good example of a statute with a broad grant of authority. Like many of these statutes, it requires that any use not interfere with regular school activities.

> The board of education of a city, exempted village, or local school district may authorize the opening of schoolhouses for any lawful purposes. This section does not authorize a board to rent or lease a schoolhouse when such rental or lease interferes with the public schools in such district, or for any purpose other than is authorized by law.
>
> Ohio Rev. Code Section 3313.75

Iowa, by contrast, enumerates certain purposes, but these purposes are quite broad.

> The board of directors of any school district may authorize the use of any schoolhouse and its grounds within such district for the purpose of meetings of granges, lodges, agricultural societies, and similar societies, for parent-teacher associations, for community recreational activities, community education programs, election purposes, other meetings of public interest, public forums and similar community purposes; provided that such use shall in no way interfere with school activities; such use to be for such compensation and upon such terms and conditions as may be fixed by said board for the proper protection of the schoolhouse and the property belonging therein, including that of pupils, except that in the case of community education programs, any compensation necessary for programs provided specifically by community education and not those provided through community education by other agencies or organizations shall be compensated from the funding provided for community education programs.
>
> Iowa Code Ann. Section 297.9.

The Iowa statute also serves to emphasize the importance of checking these statutes for their scope. Many will incorporate restrictions or conditions which it is critical to be

aware of from the outset. The Iowa statute mentions the protection of property and compensation for programs under the auspices of a community education program; the Pennsylvania statute below covers the funds raised by such use:

> . . . Funds raised by individuals, groups, associations or corporations, through the permissive use of school grounds or buildings, . . . shall be the property of the individuals, groups, associations, or corporations, and not the property of the school district, subject, however, to such arrangements as the board may, at its discretion, lawfully make.
>
> 24 Pa. Stats. Section 7-779

The New York statute[5] provides that the use of school property on occasions where fees are charged and are under the exclusive control of religious groups is impermissible. This might preclude a religious group from contracting to provide a SACC program in the public school. As in other areas of the law, the traditional difficulties in trying to balance the right of religious groups to play a role in child development and the prohibition of state support or entanglement with religion will also rear its head in the provision of SACC.[6] Since this is an area of law undergoing dramatic changes at the present time, it will be important to review the most current court decisions to assess the school's rights and obligations with respect to religious groups.[6] Just as the interpretation of the statute may preclude religious groups from using such space, it may also preclude private groups from using such space for profit.[7]

Finally, it is always important to carefully distinguish between school-operated programs and use by outside groups and determine whether the statutory language allows both options or only one. For example, while Virginia's statute governing permissive use of school property is quite expansive[8] as is its general powers and duties provision,[9] the Attorney General of that state was of the opinion in 1978 that Virginia school boards were not legally authorized to operate day care centers in their schools, but were authorized to "allow a day care center operated by another entity to use school property."[10]

Community Education Statutes: Some states, such as North Carolina,[11] have community education statutes, generally found in the school or education code, which encourage the use of school facilities for community purposes, and such statutes may make specific reference to child care. These statutes may provide helpful support to a public school contemplating the operation of SACC when other enabling legislation is absent or ambiguous.

Specific "Enabling" Legislation: It is encouraging to note that a few states --Tennessee, Oregon, Washington, Hawaii, Michigan, Maryland, and Massachusetts among them[12] -- have passed legislation which expressly authorizes schools to operate and/or lease out space to organizations which provide child care. Some of these statutes make specific reference to school-age child care. An example of the statute expressly authorizing schools to establish and operate child care programs is Washington's statute which provides:

> A board of directors of any school district shall have the power to establish and maintain nursery schools and to provide before-and-after-school and vacation care in connection with the common schools of said district located at such points as the board shall deem most suitable for the convenience of the public, for the care and instruction of infants and children residing in said district . . .
>
> Wash. Common School Provisions, Ch. 28A.34

Hawaii's statute takes a different approach. It specifically enables school districts to lease space to child care programs. It reads, in pertinent part:

> The Department of Education may enter into agreements and contracts with individuals, organizations, or agencies for the use of public school buildings, facilities, and grounds for the operation of after-school child care programs. The Board of Education shall issue such rules as are necessary to carry out the purposes of this section.
>
> Hawaii Rev. Stat. Section 298.23-5

Maryland's statute also enables child care programs to use public school facilities; significantly, however, it also grants these programs a priority for use of space.[13]

Reviewing enabling legislation is only the first step in developing public school involvement in school-age child care, but it is an essential first step. On the basis of legal challenges to SACC programs which have reached the courts to date, it is safe to say that most statutes will be interpreted to allow public schools to offer these services. Nevertheless, if the statute in your state is vague and/or ambiguous, or more restrictive legislation has been proposed,[14] schools should actively support revision of legislation to expressly confer this power. A well-drafted enabling statute cannot cover every aspect of school-age child care, nor should it attempt to. Operational specifics are better left to board resolutions and/or regulations which allow for more local autonomy and flexibility. (See Section on Board Resolutions.) Nevertheless, a well-drafted statute should, at a minimum, cover the areas spelled out in the model enabling statute which appears in Appendix A.

CHAPTER 1

FOOTNOTES

[1]Clark v. Jefferson County Board of Education, 410 So.2d 23 (Ala. 1982); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Education, 285 S.E.2d 110 (N.C. 1981), appeal dismissed, review denied 291 S.E.2d 150; Arkansas Professional Child Care Assoc. v. Little Rock School Dist. (unpublished 1982).

[2]Sometimes known as school committees, board of directors, board of trustees, etc.

3 See, e.g., Commonwealth v. Arlington County Bd., 217 Va. 558; 232 S.E.2d 30 (1977).

[4]For example, California's Constitution, Art. IX, Sec. 14, authorizes the legislature to permit school districts "to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established." Pursuant to this constitutional amendment, Education Code Section 35160 was passed which authorizes school districts to "initiate and carry on any program, activity or . . . otherwise act in any manner which is not in conflict with . . . any law . . ."

[5]N.Y. Education Code 414(1)(d).

[6]See, e.g., County Hills Christian Church v. Shawnee Mission School District, 560 F.Supp. 1207 (Kansas, 1983) and the recent decision, Lynch v. Donnelly, 52 U.S.L.W. 4317 (March 5, 1984) which appears to restrict considerably the scope of the prohibition of state support for, or entanglement with, religion.

[7]Iowa Op. Atty. Gen. (Camp) Jan. 27, 1972 (in absence of primary benefit to school district or joint community purpose school not authorized to lease school gymnasium to an

individual planning to conduct classes for profit, even though classes would not interfere with school use). Because child care programs would likely constitute a joint community purpose, this opinion appears inapposite; however, some statutes may expressly prohibit the leasing of space to profit-making entities. See also Tenn. Code Ann. 49-50-201 and Tenn. S.B. 559, introduced February 16, 1983 which was intended to amend that section (allowing leases with private proprietaries). Leasing of space to commercial entities may also raise tax issues; see Rensselaer Polytechnic Institute v. C.I.R., 83-4101, decided by the 2d Circuit, April 11, 1984.

[8]Title 22 Code of Virginia Section 22.1-131.

[9]Title 22 Code of Virginia Section 22.1-79.

[10]Va. Op. Atty. Gen., December 11, 1978. Schools. Day Care Centers. Local School Boards Do Not Have Legal Authority To Operate Day Care Centers Upon School Property With School Board Employed Personnel.

[11]See, e.g., N.C. Community Schools Act, G.S. 115-73.6 et seq.

[12]Tenn. Code Ann. Section 49-215(4); Oregon Rev. Statutes Sections 418, 375; Revised Code of Wash. Section 28 A. 34.010; Hawaii Rev. Stat. Section 298-23.5; Mich. Section 380.1285; Mass. Gen. Laws Ch. 40 Sec. 3 Chap. 496; Maryland Education Code Ann. Section 7-109.

[13]Maryland Education Code Ann. Section 7-109.

[14]See, e.g., Arizona HB 2147 introduced January 22, 1981.

CHAPTER 2

SCHOOL BOARD RESOLUTION CONSIDERATIONS

Subject: Resolution No. 91-9A5
CHILD CARE NEED IN SAN FRANCISCO

WHEREAS: Child care is a critical need in San Francisco, and

WHEREAS: The San Francisco Unified School District encourages parents in cooperatively working to find solutions to the problem and wishes to work with them;

THEREFORE BE IT RESOLVED: That the Board of Education encourage the use of Public School buildings for after-school child care subject to the following requirements:

1. The groups must have or be actively seeking tax exemption status;

2. The program shall not begin until the end of the regular school day, with the exception of Kindergarten, which may begin at the end of the Kindergarten day;

3. The program must have support of the principal;

4. There must be a determination by the Superintendent that the program is in the best interests of the students; and

5. That the lease shall contain a strong anti-discrimination clause in both enrollment and hiring.

Adopted 1/23/79. (The San Francisco Board of Education subsequently adopted a more detailed resolution.)

WHY THE NEED FOR A RESOLUTION?

Enabling legislation authorizes, but it does not ensure, public school participation in the provision of school-age child care. Neither enabling legislation nor documented need alone will be sufficient in most instances to spark public schools to become responsive. Principals, superintendents and other school officials may still be reluctant to operate or contract for SACC because of the lack of guidance, support and encouragement from their local school boards. Thus, school board resolutions play a key role in the development of SACC programs. Resolutions serve to legitimate and institutionalize school-age child care throughout a district, making the establishment of such programs less dependent on the personal predilections of principals and the level of sophistication or organization of parents in particular neighborhoods.

WHAT FORM SHOULD THE RESOLUTION TAKE?

Prior to formulating a resolution, a school board needs to address itself to a few critical issues. As a preliminary matter, it should assess the needs of parents for school-age child care. Such a "needs survey" should do more than simply ask whether parents need school-age child care or subtract the number of school-age child care slots presently available in the community from the number of school-age children of working parents. Schools should determine what kind of care both parents and children are likely to desire and use, what hours such care is needed, where such care should take place, how much parents can afford to pay[1], how many of their children would use the services, and whether their children might require certain additional services (transportation, extra supervision due to special needs, etc.). Such a survey need not be lengthy or expensive. After completion, the survey should be followed by a public hearing at which time the needs identified in the survey can be discussed. The school board should also undertake a space utilization survey. The objective of such a survey is to identify facilities and sites which are underutilized, which are in good repair and appropriate for the establishment of SACC, and are available for a minimum period of two years. Finally, it would be helpful for the board to review whether any licensing or zoning requirements would have to be met if child care were to be established on school sites. (See section on Regulation.) Because the answer to that question may turn on

whether the school itself or an outside group operates the program, the requirements of both options should be reviewed.

The school board should then decide the scope of its proposed resolution. The resolution might be a general policy statement supporting public school involvement in the provision of SACC, a statement supportive of public school operation of SACC programs, a statement supportive of leasing space to child care programs and/or a joint occupancy resolution which would be broader in scope than a resolution specifically addressing SACC. The Board also needs to determine whether the resolution will be accompanied by regulations or guidelines and who will promulgate them. It is preferable that a school board draft a resolution which sets out only a general policy. More detailed concerns of program establishment and operation can be formulated as regulations or guidelines either by the school board, the superintendent, or personnel hired specifically to handle joint occupancy with, or operation of, SACC programs. Each Board will have to determine for itself, in keeping with its customary practice, just how detailed its resolution and regulations will be. One option is for the school board to draft a general resolution and more specific guidelines and leave to other personnel the drafting of a very detailed operations guide or manual.

WHAT SHOULD THE RESOLUTION CONTAIN?

A resolution should begin with a statement of need and address itself to why public school participation in SACC is necessary and/or desirable. If the resolution is a generic joint occupancy policy it should, at a minimum:

* Create priorities for the leasing of unutilized or underutilized space and facilities, with child care ranking second only to educational programs which are an integral part of school operations (special education classes for example);

* Identify which groups are eligible to lease space which may be determined in part by enabling legislation (parent-run? community agencies? private nonprofit tax-exempt? proprietary? religious?);

* State the policy with regard to cost of rental. This might include reduced rental for, or waiver or deferral of rental payments by, child care programs. Consideration should also be given to whether a child

care program must be self-supporting, and if so, in what respects (i.e., will programs pay only rent or will they pay a pro rata share of utilities, janitorial services, etc., or will rent and other costs be considered an in-kind contribution of the school?);

* Approve a policy of joint occupancy thereby enabling programs to operate for school-age children whose school day is not a full session. Such a policy should, of course, require that any joint occupants must not interfere with ongoing school operations. While the object of the joint occupancy policy is to enable programs to operate during school hours, it should be made clear that such programs may operate before and after school hours as well;

* Require that each independent entity conform to any pertinent existing school regulations and all other applicable legal requirements including zoning and licensing regulations;

* Require that in any lease or contract with any independent entity language protecting the school board and school system from any liability claims is to be included;

* Require that any independent provider leasing space from the school purchase liability insurance in a specified amount, naming the school as the principal insured.

Irrespective of whether the school operates the program or leases space, the resolution should include:

* A nondiscrimination requirement for enrollment and hiring;

* A statement that every effort will be made to ensure that no child will be denied participation in the program because of inability to pay. If the program is to be run by an outside group, the school should pledge its assistance in helping the group meet this requirement.

A model resolution appears as Appendix B in this manual; an example of guidelines for the operation of SACC programs within public school by independent groups appears as Appendix C.

CHAPTER 2

FOOTNOTES

[1]The breadth of a recent California Supreme Court decision may place in jeopardy the ability of school-operated school-age child care programs in California to charge fees, making the issue of how much parents are able or willing to pay a moot point. In Hartzell v. Connel, 84 Daily Journal D.A.R. 1417, the court ruled that school district charges for extracurricular activities violated the California Constitutional provision mandating free public education. This ruling occurred despite the existence of a fee waiver procedure for students unable to pay the extracurricular fees. The court did not adopt the view that the scope of a free education was limited to the prescribed curriculum required for graduation. Instead, it viewed all educational activities -- curricular or extracurricular -- as falling within the scope of the free public education guarantee.

"Educational" was defined in an exceptionally broad manner; in footnote 14 (dictum) the court noted, "Educational activities are to be distinguished from activities which are purely recreational in character. Examples of the latter might include attending weekend dances or athletic events." (emphasis supplied) Whether after-school programs operated by public schools fall within the purview of this case or are distinguishable on the facts remains to be seen in California. However, it is important to note that other state courts ruling specifically on that issue have reached the opposite conclusion, finding that after-school programs, even those with a substantial educational component, do not come within the scope of state-mandated free public education. See Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Ed., 285 S.E. 110 (N.C. 1981).

CHAPTER 3

REGULATORY CONSIDERATIONS

> The state's authority over children's activities is broader than over like actions of adults . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.
>
> Prince v. Massachusetts, 321 U.S. 158 at 168-9 (1944).

Prior to the provision of SACC on a public school site, it is necessary to determine whether the program needs to be licensed.* In the case of school-age child care programs, the type of program offered and the entity operating the program generally will determine not only whether the program is subject to licensure, but also which agency has jurisdiction over the program.

*Licensing is only one form of regulation potentially applicable to the operation of child care. However, it usually incorporates by reference other building code, fire code, etc. requirements and often mandates compliance with other applicable laws and regulations, like zoning. The term licensing is also meant to incorporate other regulatory systems including registration, certification, etc.

Which State Agency Has Jurisdiction Over Licensure?

The first step for any school planning to participate in the provision of SACC is to determine which state agency will be responsible for regulating its school-age child care program. Generally speaking, a program operated by an agency other than the school on a school site will be under the jurisdiction of the same state agency which regulates child care programs. This may be the state's Department of Social Services (California), Office for Children (Massachusetts), Department of Human Services (Tennessee), Department of Children and Family Services (Illinois) or other agencies of similar title and function. Most of these agencies will have a specific unit which regulates child care programs. In some states, the unit will regulate only child care programs; in other states the unit will also have responsibility for regulating other similar types of care.

When the school itself operates the program, it too may be subject to the regulatory requirements of the general child care regulatory agency.[1] However, in some states it may be exempt from complying with these requirements. Instead, it may be subject to the regulatory requirements of the state's department of education or other agency governing the schools. In other states, the programs might be subject to the requirements of both types of agencies, in others neither. Therefore, as a preventive measure to ensure compliance with the proper regulatory measures, public school administrators should contact both their state's general child care regulatory agency and their state department of education to determine which agency, if any, is responsible for regulating SACC programs operated by them.

Is the Program Subject to Regulation?

The determination of which agency, if any, has jurisdiction over the program still will not determine whether the program is subject to regulation. Each state has exemptions from its regulatory scheme. The type of care offered is the greatest determinant of whether a program is subject to regulation, but regulation also may depend on who runs the program.

Type of Care Offered: The regulations of many states exempt drop-in programs, periodically offered programs, child care which is offered as part of a child development laboratory

and/or programs which operate for fewer than a set minimum of hours per week. Summer camps may also be exempted or subject to other forms of regulation. As each state's regulatory requirements vary substantially, they should be individually and carefully reviewed. As an example of the type of exemptions found in the regulatory statutes, the pertinent portions of the Virginia statute appear below.

> "Child care center" means any facility operated for the purpose of providing care, protection and guidance to a group of children separated from their parents or guardian during a part of the day only except (1) a facility required to be licensed as a summer camp under sections 35-43 through 35-53; (2) a public school or a private school unless the Commissioner determines that such private school is operating a child care center outside the scope of regular classes; (3) a school operated primarily for the educational instruction of children from two to five years of age at which children two through four years of age do not attend in excess of four hours per day and children five years of age do not attend in excess of six and one-half hours per day; (4) a facility which provides child care on an hourly basis which is contracted for by a parent occasionally only; (5) a facility operated by a hospital on the hospital's premises, which provides care to the children of the hospital's employees, while such employees are engaged in performing work for the hospital; and (6) a Sunday school conducted by a religious institution or a facility operated by a religious organization where children are cared for during short periods of time while persons responsible for such children are attending religious services.
>
> Code of Virginia, Ch. 10, Section 63.1-195.

Who Operates the Program: Who operates the program may also determine if the program is subject to licensure. In some states, school-operated programs may be exempt from general regulatory requirements. Some states exempt or modify requirements for programs operated by religious groups even when these programs are open to children from the general public.[2] However, as a preliminary matter, enabling

legislation and constitutional considerations may preclude public schools from making space available to religious-run groups on an ongoing basis.[3] This is a rapidly changing area of the law. It is advisable to review the most up-to-date decisions before developing procedures for the supplying or denying of space to religious groups. It is also advisable to determine whether licensing of religiously-based programs can be compelled when school facilities are used.

COMPLIANCE WITH REGULATIONS

Generally, school-based child care programs should not encounter special regulatory problems, particularly respecting the facility itself, because school facilities are generally already in use by children. Indeed, compliance may be easier than for programs in other types of facilities. For example, in Michigan, child care based in school buildings approved by the state fire marshall for public school use are exempted from compliance with the usual fire safety provisions.[4] Nevertheless, because child care regulations are sometimes inappropriate to school-age child care, or more stringent than school safety regulations, operators of child care on public school sites may encounter difficulties. Sometimes these difficulties can be resolved directly with agency personnel by determining the proper interpretation of regulations when the interpretations have been inconsistent, but there may be instances which require either waivers or legislative or regulatory reform.

Because the process of being deemed in compliance with regulations may take an exceedingly long time in some states, schools should only require that programs provide some documentation that their applications are pending with the appropriate regulatory agency.

WHAT ASPECTS OF SACC ARE REGULATED?

As of this date, very few states[5] have revised their child care regulations to reflect the unique character of school-age child care. As a consequence, many states have regulations which fail to distinguish the needs of infants and toddlers from school-age children; inappropriate staffing, facilities, and programming requirements are the result.

By contrast, the states which have rewritten their regulations to reflect school-age child care needs are substantially more appropriate. Briefly, some of these revised regulations include:

Programming

> The facility shall provide a program and activities that recognize the developmental and educational needs of school-age children who need group care before and after school.
>
> Quiet activities such as, but not limited to, puzzles, small games, reading books, simple art or special projects, and opportunities to do homework shall be accessible on a free choice basis to children waiting in the facility to leave for school during the morning hours.
>
> Children who have been in school all day shall have time set aside for relaxation and recreation immediately upon arrival from school.
>
> Opportunity shall be available for the development of skills in such areas as, but not limited to, sports, art and music.
>
> Special projects outside the confines of the facility shall be provided, such as trips to the library.
>
> The program shall be flexible to allow the children to participate in after-school activities sponsored by the school.
>
> Illinois Department of Children and Family Services, Subchapter E: Requirements or Licensure, Section 407.28, School-Age Children.

Staff/Child Ratios

a) Each preschool, infant and toddler, and school-age program shall have at least the following number of caregivers with each group of children:

1. Six weeks through 30 months of age: One group leader

for four children, or one group leader and one assistant for a group of five through eight. No group in this age range shall exceed eight.

2. Thirty months through four year olds: One group leader for 10 children, or one group leader and one assistant for a group of 11 through 20. No group in this age range shall exceed 20.

3. Five through 9 years: One group leader for 15 children, or one group leader and one assistant for a group of 16 through 30. No group in the age range shall exceed 30.

4. Ten through 14 years: One group leader for 20 children, or one group leader and one assistant for a group of 21 through 40.

b) Each group home shall have at least the following number of caregivers with each group of children:

1. Six weeks through 14 years of age: One person for six children or 2 persons for a group of 7 - 12 children. No more than two children under the age of two shall be allowed in the group home.

2. Thirty months through 14 years of age: One person for 10 children, or 2 persons for a group of 11 or 12 children.

3. Six years through 14 years of age: One person for a group of 12 children.

In a group of children of varying ages the number of caregivers shall be determined by the age of the youngest child in the group.

Oregon CSD Rules 412-10-027.

Building Use

A. Buildings (School Age Care)

1. Separate areas shall be provided for children in this age range past the first grade. Children in grades K-1

may be a part of the pre-school group.

2. Provision shall be made for study space for those children who wish to study. Equipment shall vary according to the ages and academic needs of the children served and shall consist of, but not be limited to, tables, chairs, lamps, dictionaries, etc.

B. Light, Ventilation, and Heat (School Age Care)

Additional lighting equal to 100 footcandles shall be available at desks or tables where children are studying.

C. Play Facilities (School Age Care)

Outdoors
The center shall either provide open spaces for running and games or provide supervised excursions to public or private playgrounds.

D. Sleeping Facilities (School Age Care)

There shall be sufficient cots, sheets, and blankets for those children who occasionally wish to rest or take a nap.

E. Toilet and Handwashing Facilities (School Age Care)

1. There shall be provided within the building at least one flush toilet and one sanitary wash basin for every 15 children.

2. Children shall be provided privacy for the use of toilet facilities.

Commonwealth of Virginia, Minimum Standards for Licensed Child Care Centers.

ENFORCEMENT

It is imperative that school-age child care providers comply with applicable regulatory requirements. The burgeoning numbers of school-age children needing care and the growing concern of child care providers and regulators that existing child care regulations frequently fail to address the

needs of school-age children is currently resulting in a good deal of review and revision of these regulations. Therefore, in order to be in compliance, it is important for providers to keep abreast of regulatory developments. There should be ongoing communication with regulatory agencies to ensure compliance; this is of particular concern in states in which regulatory agencies operate on the basis of guidelines or policy memos rather than published regulations.

When the school contracts with an outside agency to provide care on a school site, the school may choose to impose requirements which are supplemental to regulatory mandates, particularly in those states where regulations and enforcement are considered inadequate to protect the health and safety of children. However, any school choosing to do this should be certain that any additional requirements are clearly delineated in a written contract with the contracting agency to avoid later misunderstandings.

CHAPTER 3

FOOTNOTES

[1]See Tenn. Dept. of Human Services, Standards for Day Care Centers Serving School-Age Children, Section 1240-4-6-.01, et seq.

[2]A number of states have passed legislation which treat religious-run child care differently--some statutes provide for total exemption while others require compliance with lesser standards than those required for other programs. See, Alabama Welfare Code Section 38-7-3; Arkansas Stat. Ann. Section 83-918; Ill. Stat. Ann. Title 23 Section 2212.09 West's Ann. Indiana Code 12-3-2-12.7; Vernon's Ann. Mo. Stat. Section 210.11; N.C. Gen. Stat. Section 110-106; S.C. Children's Code Section 20-7-2910; and Code of Va. Section 63.1-196.

[3]See Enabling Considerations, p. 8.

[4]State of Michigan, Licensing Rules for Child Care Centers, R 400.5304.

[5]See, e.g., Ill. Dept. of Children and Family Services, Subchapter E: Requirements for Licensure, Section 407.28 School-Age Children; footnote 1 above.

CHAPTER 4

LIABILITY CONSIDERATIONS

> It is all very well to say "Drink me," but the wise little Alice was not going to do that in a hurry. "No, I'll look first," she said, "and see whether it's marked 'poison' or not": for she had read several nice little stories about children who had got burnt, and eaten up by wild beasts, and other unpleasant things, all because they would not remember the simple rules their friends had taught them: such as, that a red-hot poker will burn you if you hold it too long; and that, if you cut your finger very deeply with a knife, it usually bleeds; and she had never forgotten that, if you drink much from a bottle marked "poison," it is almost certain to disagree with you, sooner or later.
>
> -- Lewis Carroll, Alice's Adventures in Wonderland from The Annotated Alice. Introduction and Notes by Martin Gardner (New York: New American Library, 1960), p. 31.

No single legal issue engenders as much concern in the school-age child care field as liability. Such concern is not unfounded given the extent of possible liability exposure and the unpredictable outcome of many, if not most, liability lawsuits. Liability exposure can assume tremendous proportions both because injured children may require compensation for the duration of their lives (which may be a substantial period) and because damage awards are rising for all types of liability cases. The unpredictability of outcome is due to lack of existing law on liability in SACC, the variety of factual situations, the rapid expansion of liability in the whole area of negligence and the frequency of jury trials in such lawsuits. Jury trials generally lack the consistency of principle and outcome evident in trials before judges, although this area seems to engender unpredictable outcomes before judges as well. It may be that the severity of the injury to a young child and the desire to find a "deep pocket" to compensate the victim are the real factors responsible for the diversity of outcomes.

Nevertheless, the mere occurrence of an "accident" does not always indicate liability. Moreover, public schools already face much of the same liability exposure in the provision of public education, so the concerns and the precautions to be taken are not unfamiliar. With careful consideration of the unique areas of liability present in SACC programs, development of methods to minimize this exposure, and purchase of adequate insurance, no public school should find potential liability an insurmountable stumbling block to the establishment of SACC.

Scope of this Section — A Caveat

The limited scope of this manual precludes a review of all situations in which liability may arise, all available defenses and all legal doctrines which play a role in a liability case. Therefore this section will not cover intentional torts,[1] strict liability ,[2] specific statutorily imposed duties,[3] criminal liability,[4] civil rights violations,[5] malpractice,[6] work-related injuries,[7] or breaches of contracts.[8] It also will not cover the potential liability exposure of state licensing agencies for their negligence in failing to inspect facilities, approving deficient programs, failing to act on complaints, failing to maintain adequate records, etc.[9] Indeed, there will be no discussion at all of third-party liability.

To review every possible area where negligence might arise is neither possible nor useful. What follows is a general overview of the law of negligence and defenses to liability. Cases are used for illustrative purposes only, and may not indicate the specific law in your state nor definitively how that law would be applied in a differing factual context. Specific measures to minimize liability exposure will be found in Appendix D.

What Is Negligence?

Negligence occurs when there is a breach of a duty of care which is the actual and proximate cause of the victim's injuries. The most common forms of negligence which occur in SACC programs involve negligent supervision; negligent instruction in, or choice of, activities; failure to warn of certain dangers; negligent maintenance, placement or location of facilities and/or transportation. Negligence is comprised of five basic

elements: (1) duty/standard of care, (2) failure to meet the standard of care, (3) a connection between the breach and the injury--"proximate cause," (4) foreseeability, (5) damage. While the third and fifth elements are generally self-explanatory, the first and fourth elements require some elaboration.

Duty/Standard of Care

Theoretically, there is but one legal standard of care--each person owes a duty to act as a reasonably prudent person would have acted under the same or similar circumstances.[10] However, in reality, the standard will depend on who the injured party is and who owes the duty.

Who The Injured Party Is: For example, a higher standard of care is owed to younger children than to older children,[11] because of their relative immaturity and inexperience. Likewise, a higher standard of care is owed to children with special needs[12] because of their incapacity. This is particularly important for school-age programs which care for children of widely varying ages and abilities. What constitutes adequate supervision and safety will vary tremendously depending on whether a child is five or thirteen. Furthermore, while providers may meet the standard of care by attending to the safety needs of the youngest children or by segregating the children by age, with differing standards for each, if providers are aware of special sensitivities or propensities of a particular child, he/she will be held to a standard of care which is reasonable with respect to that child.[13] It is also important to remember that the duty owed will not only extend to the children in the program, but also may extend to others on the premises.

Who Owes The Duty: The standard of care owed will also be reflective of who owes the duty. For example, in Illinois, because teachers are viewed as <u>in loco parentis</u>, their conduct must be "willful and wanton" before they will be found negligent towards the children in their care (the same standard of care owed by parents in Illinois).[14] The issue for SACC programs in Illinois is whether this statute will be applied to a school-operated program using certified teaching personnel or whether it is limited to activities which are integral to the traditional schooling function.[15] Another instance in which the standard of care may differ is when a person has special skills.

For example, if an adult working with the children is also a medical professional, he/she will be held to a higher standard of care in rendering medical assistance in an emergency than an ordinary individual with no medical training.[16]

Standard Of Care Resulting From Statute: Some states implicitly define the standard of care as compliance with existing laws and regulations. In these states failing to comply with a statute is presumed to be negligence if certain conditions exist. For example, in California the failure of a person to exercise due care is presumed if:

1) He violated a statute, ordinance, or regulation of a public entity;

2) The violation proximately caused death or injury to person or property;

3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

This presumption may be rebutted by proof that:

1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or

2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

Cal. Evidence Code Section 669.

It is important to note, however, that compliance with statute might be a necessary but not sufficient protection from liability for negligence. If a reasonable person would have done more than simply comply with the statute, that is the standard one's conduct will be judged against.

Foreseeability of Harm

Liability will only occur if, in addition to a breach of duty owed, the injury which resulted was foreseeable. While some cases may seem to stretch the meaning of what is "foreseeable," its meaning will parallel a reasonable person's common sense in the vast majority of cases. For example, in Georgia, an operator of a day care center was found negligent in placing hot soup on a table in front of a two-year-old child who spilled the container and was burned. The court found negligence because the results of placing hot soup in close proximity of a two year old (both the spill and burn) were neither remote or unforeseeable, but obvious.[17] By contrast, when an Ohio student was injured by a fellow student who kicked the stool she was sitting on out from under her and she alleged negligence of the teacher in failing to maintain proper classroom discipline, the court ruled that the incident of assault occurred without warning and was unforeseeable.[18]

Which Type of Program Does the School Offer?

In large measure, the liability exposure of the public schools will depend upon its degree of involvement and control over the SACC program. For example, in a Florida case, a school board was held liable for injuries sustained by a student in a hazing which occurred during an after-school hours meeting of a school-sanctioned and supervised club.[19] In a New Jersey case, a board of education was not held liable for injuries sustained by a youth playing basketball after school hours in the school's gymnasium where it had no duty to supervise these activities and where it had not undertaken to provide any supervision.[20] However, because of the unique nature of some of the defenses available to schools (see below), the usual rule of thumb--that the greater the degree of control, the greater the liability exposure--may be erroneous. The areas of liability exposure will vary if the school operates the program alone, if

it is jointly operated with outside entities or if it simply leases space or offers some other forms of assistance. It is imperative that if the public school has any arrangements whatsoever with outside groups, it reduce these agreements to writing so that the allocation of liability among the parties is clear.

Who/Which Entity Is Liable?

Whether the employee, principal, school board and/or school district will be held liable will depend on the factual circumstances, and any applicable immunity statutes (see below). Under the doctrine of respondeat superior, the negligence of the employee which occurs during the course and the scope of his/her employment may be attributable to the school board. In certain states, because of the existence of a principal-agent relationship, this theory may not absolve the employee from liability; it may simply extend liability to the employee. In other states where immunity is granted to school districts (see below), this may result in total imposition of liability on the employee.[21]

Since operation of programs by unincorporated associations could result in potential liability for individual members who may be inadequately insured or "judgment proof," schools should always be sure to contract with entities which are incorporated.

DEFENSES TO LIABILITY

I. When the School Operates the Program Itself

When the school operates the program by itself, it may have various defenses available to it, which would not otherwise be available. These vary widely from state to state and should be carefully reviewed.

Governmental Immunity: In some states, school systems (personnel, board of education, school district) are shielded from lawsuits by governmental immunity statutes. Some statutes provide for absolute immunity, while other statutes provide for limited immunity depending upon which entity is being sued, what type of function was performed (discretionary vs. ministerial or governmental vs. proprietary) and whether

the injury took place during an activity considered part of the school program.[22] Since governmental immunity statutes differ markedly and each may provide for certain exceptions, it will be important to review your own state's statute.

It will also be important to review court interpretations of these statutes, since these interpretations may be limiting or unexpected. For example, in a recent California case, an action for negligence was brought by two minors who were kept after school by a teacher and were later struck by a vehicle in an intersection in which the crossing guard had already left. Notwithstanding California case law that school districts are not legally responsible for accidents students suffer before they arrive at school or after release and a California statute that absolves school districts and their employees from liability for the conduct and safety of pupils when not on school property (Cal. Ed. Code Section 44808) the court ruled that given allegations that the teacher knew or should have known that the crossing guard would no longer be on duty, it is possible for the school district to be held liable for injuries suffered by a student as a result of the school's negligence while the student was <u>on</u> the premises. In other words, because the teacher's conduct in keeping the students after school in the knowledge that doing so would endanger their safety (the alleged negligence) occurred on the school premises, it was of no significance where the injury occurred for purposes of assigning liability.[23] As one commentator has put it: "A prudent school must never presume that its students automatically shed the protective mantle of the school's duty of care when they leave the schoolhouse gate."[24]

Notice of Claim: Even those states which have abrogated governmental immunity may still have statutes requiring that persons seeking compensation for injuries file a Notice of Claim with the school district prior to filing a lawsuit. Failing to file such a notice within a prescribed amount of time may be an absolute bar to the filing of a lawsuit and as such, preclude any recovery.

Unique Statutory Schemes: Some states have statutes which are more specific than broad governmental immunity statutes; they focus on particular areas in which it will be more difficult for injured parties to successfully sue the school system. For example, California has specific legislation which provides that no school district shall be liable for the conduct or safety of any public school pupil when such pupil is not on school property. Cal. Ed. Code Section 44808.

Illinois has special legislation which has the effect of requiring that teachers and other certified educational employees must engage in "willful and wanton" conduct before they will be charged with negligence. (See Ill. School Code Sections 24-44 and 34-84a.) The issue with all such unique statutory schemes now applicable to school systems is whether such statutes would extend to after-school programs operated by the schools. The courts have already ruled that the Illinois statutes do not apply to private child care operations.[25]

II. When the Program is Either School-Operated or Independently-Operated

In addition to the defenses outlined above, which are only available when the school itself operates the program, the following defenses may be available regardless of who operates or controls the program.

Contributory Negligence/Comparative Negligence/Assumption of Risk

Unlike programs which care for infants, school-age programs may have available to them the possible defense that the children either contributed to their own injuries or assumed the risk that such injuries would occur. Whether these defenses are available will depend on which doctrines your state courts have adopted and whether they apply these doctrines to school-age children.

The Doctrines Defined: There have always been defenses to negligence, but in recent years, these defenses have undergone marked changes. At one time, most state courts took the view that if the plaintiff contributed at all to his/her own injury ("contributory negligence") he/she was absolutely precluded from recovering any damages. This "all-or-nothing" rule is now superseded in most states by comparative negligence schemes. Some states have adopted pure comparative negligence which assigns liability in direct proportion to the fault of the persons who caused the injury or damage. Consequently, recovery is not barred but damage awards are diminished to the extent the plaintiff contributed to his/her own injury. In other states, if the plaintiff's share of negligence is 50% or more, he/she will be barred from recovering from his/her injury. In cases dealing with children,

it will be important to determine not only if the child was contributorily negligent (see below) but if the parents were as well. A rather different doctrine is "assumption of the risk" (which in some ways more closely resembles "waiver" discussed below) which occurs when the plaintiffs voluntarily and unnecessarily expose themselves to a known, specific risk of which they appreciated the magnitude.[26]

Applicability of Doctrines to Minors: Whether your state has a contributory or comparative negligence scheme, it still will be necessary to determine the extent to which the school-aged child contributed to his/her own injuries. While some states have adopted the view that a child of any age can be contributorily negligent,[27] other states have retained a more traditional approach. In these states[28] children younger than seven are conclusively incapable of contributory negligence, while children from seven to fourteen years old are presumptively incapable of contributory negligence. This presumption can be rebutted by offering proof that the particular child, based on age, mental capacity, intelligence and experience was accountable for his/her actions.

In determining whether a child is contributorily negligent, the courts generally apply the following standard: when children participate in activity characteristically engaged in by children,[29] they are held to that degree of care ordinarily exercised by children of like age, knowledge, judgment and experience under similar circumstances.[30] This is an objective standard. By contrast, the standard for applying assumption of the risk is a subjective one, requiring that the <u>particular</u> child knows, sees, hears, comprehends and appreciates the <u>particular</u> risks involved.[31] Significantly, assumption of the risk by parents may not defeat recovery in an action brought in the child's name.[32]

Waiver

Statutory waivers may exist for certain types of liability. Some statutory waivers are express, such as Cal. Ed. Code Section 35331 which provides in part that: "All persons making the field trip or excursion shall be deemed to have waived all claims against the district or the State of California for injury, accident, illness or death occurring during or by reason of the field trip or excursion. All adults taking out-of-state field trips or excursions and all parents or guardians of pupils taking out-

of-state field trips or excursions shall sign a statement waiving such claims." Other statutory waivers may be implicit. For example, to prevent the possibility of lawsuits arising from a failure to supervise children in transit, Illinois' licensing requirements in effect require a parental waiver by allocating liability in a different manner than it might be assigned in a court:

> A parent shall be legally responsible for the child enroute unless transportation is provided by the facility or the school.
>
> Section 407.28(c)(1)

The more common forms of waivers are authorizations and/or releases signed by parents covering a wide range of topics. A waiver is defined as the intentional relinquishment of a known right or privilege with knowledge of the facts or conduct warranting an inference to that effect. Thus, a waiver can be oral, written or evidenced by conduct. Obviously, the preferred form is a waiver in writing. Among the most common forms of waiver are: consents to emergency medical treatment, consents to leave the program for field trips, and waiver of liabilities for injury occurring in a variety of contents.

Good Samaritan Statutes

Some states, in an effort to encourage citizens to render emergency assistance to those in need of immediate care, have passed "Good Samaritan" statutes which generally confer immunity against any civil damages for acts or omissions by persons rendering care. However, generally such immunity does not extend to those whose conduct is considered to be grossly negligent. In some states, like Massachusetts, a special "Good Samaritan" statute specifically immunizes public school teachers, principals and nurses rendering emergency first aid or transportation to a student in the school building or on school grounds.[33] However, it is important to know whom or which entities such immunity extends to, for in a recent case, the Massachusetts Supreme Judicial Court held that the immunity granted by the law does not extend to the town and school committee (board).[34]

III. When the School Operates the Program in Conjunction with an Outside Group or When it Leases Space to a Child Care Program

Whenever a school undertakes the provision of child care, either with an outside group or simply by supplying space to an independent child care program it is imperative to write a formal agreement which allocates responsibilities and liabilities for various aspects of the program. For example, as a condition of using public school space the school might wish to require that the outside group furnish information on its financial stability, that it purchase comprehensive insurance (liability, accident, vehicle, property) in a specified amount naming the public school as the insured, and finally include in the agreement an indemnity clause and an "hold harmless" clause for all or various aspects of liability. Among others, these aspects might include liability allocation for: staff conduct, injuries resulting from the condition of site facilities and equipment, property damage, etc. In the absence of an agreement, the school has a responsibility for keeping the premises and equipment under its control in a safe condition and it may be subject to liability if it fails to meet this duty of care, or if it allows a child care program to operate in facilities which are clearly inappropriate. However, its liability might be apportioned with the program if independent programs knew or should have known that the public school facilities were inappropriate or unsafe.[35]

To further minimize potential liability, schools can require as a condition of operation that independent programs have telephones available, have staff trained in first aid, conduct fire drills occasionally, and the like. (See Appendix D for checklist to minimize liability regardless of who operates the program.) Regardless of precautions taken, however, schools should always be aware that absent immunity statutes, the greater control the school exercises over the program, the greater its exposure to liability.

IV. When the School Provides Support or Assistance

As with any type of public school involvement in the provision of child care, the school should first assure itself that it has the authority to provide the type of support it seeks to lend. Even where the school chooses to just supply support services (e.g., offering transportation to school-age child care programs operated by groups elsewhere in the community,

lending equipment, etc.) schools should write out agreements with providers of child care and/or parents, spelling out their respective responsibilities and liabilities so as to minimize the likelihood of expensive lawsuits in the future.

Insurance

The complex set of factors delineated above has resulted in relatively unpredictable liability exposure for school-age child care programs. Since there is no indication that this situation will change soon, it is advisable that any entity contemplating the provision of SACC purchase adequate insurance coverage. In the absence of an amount and types of coverage mandated by law (if such requirements do exist they will be found in your state's child care licensing statutes or regulations), each program must determine for itself what constitutes "adequate" coverage. It must weigh its possible liability exposure (likelihood of injuries and their resulting cost) against the cost of premiums* which clearly have the effect of raising the cost of care. Obviously, the more comprehensive the coverage, the less the liability exposure, but if the cost of the premiums makes the cost of care prohibitive for parents, the issue of liability exposure becomes a moot point! Therefore, it will be necessary to make a judgment about where a livable balance lies.

To protect against claims brought by persons who are injured as the result of negligence it is advisable to purchase general liability insurance and vehicle insurance if the program provides transportation.

1) General Liability Insurance. This coverage will usually provide protection from claims brought by those in care as well as others who may be on the premises. It is particularly important for SACC programs to check and see if coverage also extends to injuries which occur off the

*Theoretically, the cost of premiums should diminish as a record of actual liability develops because current risk assessments, based as they are on relatively few programs, in operation only a short time, must provide for a greater margin of error. Moreover, with time, it would be expected that costs would also diminish as more programs begin, given resulting economies of scale.

premises--for example, while on field trips. Finally, it is imperative that coverage be extended to include your employees, substitutes, and any regular volunteers.

2) Vehicle Insurance. In the event the program provides transportation, it is essential to obtain adequate vehicle insurance. When the program uses vehicles it owns or leases, it should purchase a comprehensive vehicle policy. Such a policy would also cover the program's liability for injuries resulting from non-owned vehicles as well (vehicles owned by employees, parents, volunteers, etc.). While the owners of these vehicles will likely have their own coverage (normally a family automobile policy) and the program will likely be considered an additional insured under the policy, many individuals purchase only minimal protection and this may not be sufficient to cover the entire cost of injuries, thereby leaving the program exposed.

While these coverages are necessary, they are not sufficient to cover all types of damages which may occur.

Each program should also consider obtaining:

3) Property insurance: to cover the loss of a building, its contents and any improvements made. Prior to purchase of this insurance, the program should learn the value of its property so adequate coverage is purchased.

4) Accident insurance: for coverage of injuries which are not attributable to anyone; this coverage is generally relatively inexpensive and desirable.

SUMMARY

Regardless of the type of SACC program offered, the safety of the child should always be the standard against which each aspect of the program is measured. The relative youth of school-age child care programs demands that these programs take special precautions to minimize liability, given the lack of precedent to follow, but at the same time it provides a unique opportunity to develop new models for the allocation of responsibility. The range of options is vast.

CHAPTER 4

FOOTNOTES

[1]In SACC, just as in the regular school setting, potential intentional tort lawsuits would include, but are not limited to: assault, battery, defamation, false imprisonment, trespass, invasion of privacy, and intentional infliction of emotional distress. They are most likely to occur in the context of disciplining children. See, e.g., Gaston v. Becker, 314 N.W.2d 728 (Mich. App. 1981); Smalls v. Bd. of Ed. of City of N.Y., 450 N.Y.S.2d 987 (1982).

[2]Strict liability, or liability incurred as the result of placing a defective product in the stream of commerce has not been adopted by every state. A SACC program would not be held strictly liable for defective playground equipment on its premises since it is not in the business of producing the equipment, but it could be held liable on a negligence theory for failing to inspect the equipment. Strict liability theory has not been extended to products which service providers use or recommend. See, Pena v. Sita World Travel, 88 Cal.App.3d 642 (1982).

[3]The statutory framework which authorizes and regulates the operation of SACC will vary from state to state, but some statutes may include civil penalties for noncompliance. For example, in Ohio operation of a child care center without a license not only subjects the program to an injunction, thereby forcing a cessation of operation, but subjects the operator to a fine. Ohio Rev. Code Section 5104.99

[4]While it would be highly unlikely that a program would be subject to criminal liability, individual staff persons might be subject to criminal liability if, for example, they abused children in the program or if they were mandated reporters and failed to report child abuse. See, e.g., Cal.Pen.Code Section 11172 ("Any person who fails to report an instance of child abuse which he or she knows to exist or reasonably should know to exist, as required by this article, is guilty of a misdemeanor and is punishable by confinement in the county jail for a term not to exceed six months or by a fine of not more than five hundred dollars ($500) or by both.")

[5]For example, programs which receive governmental assistance will find themselves subject to a myriad of civil rights statutes and anti-discrimination laws.

[6]"Educational malpractice" is in its infancy in terms of its acceptability as a viable legal theory in the courts. Given the current unwillingness of courts to extend notions of malpractice to professional educators (see Hunter v. Board of Ed. of Montgomery County, 439 A.2d 582 (Md. 1982)), its extension to child care seems even more tenuous. Nevertheless, as the sophistication and training of child care providers grows, so too will society's expectations of the services they are to provide to children. Therefore the existence of standards to judge child care competence may some time in the not-too-distant future make child care malpractice a reality.

[7]Generally speaking, workers are only entitled to seek compensation for their lost wages and medical costs due to work-related injuries through state workers compensation schemes. However, if their injuries are due to a product from a supplier, they may be able to file a lawsuit against this third-party, or if the injury was the result of an intentional tort, they may also be able to file suit outside the worker's compensation system.

[8]These contracts may include employment contracts, leases for space, contracts for materials and supplies, etc.

[9]See Waugh v. Nieman, Contra Costa County Superior Court, #245383, 1983; See generally National Legal Resource Center for Child Advocacy and Protection, Criminal and Civil Liability in Child Welfare Work: The Growing Trend (ABA, 1983).

[10]Diabortolo v. Metropolitan School Dist. of Wash. Tp., 440 N.E.2d 506 (Indiana, 1982); Brooks v. Woods, 640 P.2d 1000 (Oak. App. 1981 -- no special standard of care owing to a retarded child).

[11]For example, a posted warning, while sufficient for an older child, will be inadequate protection for a younger child who

does not read. Restatement, Torts, 2d Section 342, Comment K.

[12]Foster v. Houston General Ins. Co., 407 So.2d 759 (La.App. 1981) (on a walk from school to another facility, mentally retarded youngster darted out into street and was killed; court noted that group of mentally retarded youngsters required closer supervision and safer route than might have been appropriate in the case of non-retarded children).

[13]Thence comes the well-worn legal phrase "You take your victim as you find him."

[14]Ill. School Code Section 24-44 and 38-84a.

[15]See, e.g., Thomas v. Chicago Bd. of Ed., 377 N.E.2d 55 (Ill. App. 1978) (holding that Illinois statute (footnote 14 above) shielded a football coach and the school system with respect to supervision of the players and hiring and training of employees but not with respect to the furnishing of equipment which turned out to be defective. Despite the fact that the injuries were sustained after-school, in a voluntary, non-credit, extra-curricular activity, the court held it was in the scope of "activities connected with school programs" as required by the statute).

[16]See Restatement 2d Torts, Section 99A.

[17]Jones v. Jones, 168 S.E.2d 883 (1969).

[18]Boyer v. Jablonski, 435 N.E.2d 436 (1980).

[19]Rupp v. Bryant, 417 So.2d 658 (1982).

[20]Morris v. Jersey City, 432 A.2d 553 (1981).

[21]Dudson v. Midland County Indep. School Dist., 627 S.W.2d 428 (Tex.Civ.App. 1981).

[22]See, Note "Teacher's Liability for Pupil's Injuries-Duty of Supervision," 19 Maine Law Review 111 (1967)

[23]Perna v. Conejo Valley Unified School Dist., 143 Cal.App.3d 292 (1983).

[24]W. Paul Hagenau, "Penumbras of Care Beyond The Schoolhouse Gate," 9 J. of Law and Education 201 (1980).

[25]Possekel v. O'Donnell, 366 N.E.2d 589 (1977).

[26]Assumption of the risk may no longer exist as a separate doctrine in comparative negligence states.

[27]See, e.g. Mann v. Fairbourn, 366 P.2d 603 (Utah, 1961).

[28]See Albers by Albers v. Church of Nazarene, 698 F.2d 852 (7th Cir. 1983 -- under Ill. law those under 7 are incapable of contributory negligence); Riley v. Johnson, 424 N.E.2d 842 (Ill. 1981 -- those 7-14 are presumptively incapable of contributory negligence); Accord, Berman by Berman v. Phila. Bd. of Ed., 456 A.2d 545 (Pa. 1983).

[29] A different standard may be applied when the minor engages in activities characteristically engaged in by adults -- driving, scuba diving, etc.

[30] Dibortolo v. Metro Sch. Dist. of Wash., 440 N.E.2d 506 (Indiana 1982).

[31] See Restatement of Torts 2d, Section 496D, Comment C.

[32] Coole v. Haskins, 57 Cal.App.2d 737 (1943).

[33] Mass. Gen. Laws c.71 Section 55a.

[34] Taplin v. Town of Chatham, 390 Mass. 1 (1983).

[35] See Perish v. Matteson School Dist., Ill. Cook County Cir. Ct., No. 77 L 17214, Oct. 15, 1982 -- Jury verdict granted in case which alleged the school liable for allowing adult basketball game, sponsored by park and recreation department, where glass door was located too close to basketball court, further alleged that the park district was liable in conducting its program on unsafe premises it failed to inspect.

CHAPTER 5

SPECIAL NEEDS CONSIDERATIONS

> To what extent is a de facto isolation of parents and their handicapped children occurring?
>
> Are women being denied the opportunity to use and celebrate their talents, to enter the labor force, to contribute to their families' financial resources, or otherwise to find a daily respite from what may be a lifelong responsibility? Are children with more than minimal handicaps being denied the opportunity to experience life outside home and the usual clinical settings?
>
> Testimony of a parent from San Jose, California, quoted in the California Governor's Advisory Committee on Child Development's Report, "Child Care Needs of Exceptional Children," 1983.

INTRODUCTION

Children with special needs[1] and their parents require school-age child care for the very same reasons other children and parents do. Indeed, the parents' need to work, to go to school or have some respite, and the children's need for activities which promote their developmental potential, their social skills and their autonomy outside the familial context may be even greater because of these children's special needs. Regardless of whether the need is equal or greater, the supply of affordable, available child care for such children is appallingly inadequate. Discrimination, lack of funding for special services, lack of trained personnel and fears of liability, both real and imagined, contribute to this critical lack of services. When a public school determines it will participate in the provision of school-age child care, it should not neglect to consider availability of services to special needs children. While serving them will depend on legal obligations and ability

to serve their needs, public schools must also recognize that frequently they are the most logical providers, as a consequence of their existing responsibilities under Section 504 and P.L. 94-142. Not only are public school facilities already physically accessible in most cases, but schools can often offer suitable transportation, experienced personnel, expertise in programming and a central link to other supportive services.

LEGAL OBLIGATIONS

Section 504 and Parallel State Statutes

Section 504[2] of the Rehabilitation Act of 1973 is often termed the "Bill of Rights for the Disabled." It declares that:

> No otherwise qualified handicapped individual in the United States shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Federal "financial assistance" basically is defined as the provision of anything of value.[3] Courts have interpreted Section 504 so that an entire institution need not be receiving federal funding to be subject to its requirements.[4] However, in a recent Title IX decision, Grove City College v. Bell,[5] the Supreme Court narrowly interpreted the meaning of "educational program or activity" receiving federal financial assistance. It held that the Education Department could only enforce Title IX's anti-discrimination provisions in the "program or activity" within the institution receiving federal assistance, not throughout the entire educational institution. While this ruling did not specifically concern Section 504, Congress is now considering legislation to ensure that Congress' broader interpretation is carried out in all the major statutes which condition the receipt of federal funds on nondiscriminatory practices. Rapid developments in this area demand that careful attention be paid to the most up-to-date law before proceeding when a child care program receives public funds. If federal assistance is involved, access by the handicapped to all aspects

of school-age child care programs must be ensured by the public school system which operates a program. School-operated programs should have a clearly expressed nondiscrimination policy. When the school leases out space it should require nondiscrimination as a condition of its lease; if it contracts with an outside group such a provision should be incorporated in the contract. Finally, it should require that any group to which it lends assistance should also maintain a nondiscrimination policy. School administrators should also determine the existence and scope of state anti-discrimination laws, for they may differ from federal requirements in significant ways. For example in California, Government Code Section 11135 provides that:

> No person in the State of California shall, on the basis of ethnic group (identification, religion, age, sex, color or physical or mental disability be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state. (emphasis supplied)

One would want to know if any differences exist between those considered "handicapped" under Section 504 and those who have a physical or mental disability under Government Code Section 11135. When funds are received from both federal and state sources, the broader interpretation will govern. States may also differ with respect to enforcement. For example, in California, by contrast with Section 504, only those parts of the program receiving state funding are subject to Section 11135 requirements. Thus, it is advisable to learn of any significant differences between your state anti-discrimination legislation and Section 504.

94-142 And Parallel State Statutes

The Education for All Handicapped Children Act of 1975, commonly known as Public Law 94-142[6] requires that all handicapped[7] children, aged 3-21[8] must receive a free education, suited to their individual needs. Every child who comes within the scope of 94-142 must have an Individualized Education Plan (IEP), a written document, which among other

things, must specify the special educational instruction and nonacademic services required by the pupil. The regulations provide:

> (a) General. (1) A recipient to which this subpart applies shall provide non-academic and extra-curricular services and activities in such manner as is necessary to afford handicapped students in equal opportunity for participation in such services and activities. (2) Non-academic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.
>
> 34 CFR Section 104.37

Therefore, if before or after school care were shown to be necessary to ensure that a handicapped child achieve educational goals appropriate to his/her development and cognitive level or potential, child care services could fall within the scope of Section 94-142 and be included as part of an IEP. Again, public school administrators should determine the existence and scope of any parallel state statutes. Such state statutes or regulations should not purport to limit "related services." If they do, they may be violative of P.L. 94-142. The statutes may authorize and/or require the expenditure of funds for such services.

Legal Requirements Relating Specifically to the Admission of Special Needs Children Into Child Care Programs

In addition to general nondiscrimination statutes, some states have special legal requirements relating to the admission of special needs children into child care programs. These requirements are generally found in the state's licensing regulations and they vary dramatically. The three regulations below were chosen specifically because they cover the major

points along a continuum. Exemplifying the most restrictive access regulation is California's which provides:

> Children who are physically handicapped or emotionally disturbed shall not be accepted, unless it is determined that:
> (A) There will be no adverse affect (sic) upon other children, either through direct behavior of the child or through requiring staff time needed by other children, and
>
> (B) The nursery is able to meet the individual needs of the child. (Emphasis supplied.)
>
> (Cal. Admin. Code, Title 22, Section 31221(b)(3) (this regulation has recently been superseded, see Cal. Admin. Code, Title 22, Section 81068(c).

Oregon's regulations take a middle course:

> As required by Oregon's civil rights laws (ORS 30.670, 659.425), services to children must be available without discrimination on the basis of race, religion, color, national origin, sex, marital status of parent, or because of mental or physical handicap. Refusal by the operator to care for a child with a mental or physical handicap because of lack of related skills and degree of competence, or because of structural barriers in the facility, shall not constitute discrimination. However, the burden is on the operator to establish that the refusal to care for a handicapped child was not an act of discrimination.
>
> Oregon CSD Rules Section 412-10-015(2)

At the other end of the continuum is South Dakota's regulation which provides:

> A provider shall not discriminate in the provision of services to any eligible individual by reason of race,

color, creed, religion, sex, ancestry, handicap or national origin. A statement of compliance with the Civil Rights Act of 1964 and the SDCL 20-13 shall be submitted by a provider to the department prior to the issuance of the license or certificate of approval.

SD Regulations Governing Child Care, Section 67:42:01:13

Regulatory Requirements

Once it is determined that special needs children are to be served, it will be necessary to comply with regulatory requirements. Some states have additional requirements for programs which include special needs children. These requirements may require special programming, special staffing, differing staff/child ratios, special facilities and/or access to certain other resources. The most general type of additional regulatory requirement is exemplified by Indiana's regulation:

Day nurseries providing care for mentally or physically handicapped or emotionally disturbed children shall avail themselves of appropriate professional consultation in order to meet the individual needs of each such child, and shall report such cases to the State Department.

Dept. of Public Welfare, Title 3, Ch. 4 Reg. 3-436.

More stringent in its requirements is Hawaii's Section 17-892-25 which provides:

(a) When children with handicaps are admitted into a group day care center or group day care home, the facility shall provide for the special needs of each child.

(b) The handicapped child shall be admitted only after consultation with the child's source of health care and the program's health consultant occurs. The consultation shall include written recommenda-

tions to cover the child's special needs or to define the child's participation in the program.

(c) If the child's health care source considers it advisable, the staff of the program shall receive training related to the nature of the child's disability and the child's potential for growth and development.

(d) Where the nature of the child's handicap or the number of handicapped children in the program necessitates added care, staff and equipment shall be available to cover these requirements.

Some states, like Maine, require that the facility seek special approval for providing such care:

Physically, emotionally or mentally handicapped children requiring special care or who need extra individual attention shall not be admitted to a day care center unless its staff includes persons with sufficient training and/or experience and the facility is approved by the Department licensing personnel for such care.

Maine, Rules and Regulations pertaining to the Licensing of Day Care Centers, ch. 32, Sec. 4(c)(3).

Other states like Massachusetts[8] and Illinois[9] have extensive and detailed requirements for caring for special needs children within their general child care licensing regulations.

Liability

Generally speaking, if the program utilizes a clear and comprehensive contract with parents, and exercises reasonable care, it should incur no greater liability caring for special needs children than it would caring for other children.[10] However, in the context of caring for special needs children it is particularly important that contracts include provisions concerning fees, absence policies, and administration of medications and other specialized procedures.

Fees: Attempts should be made to ensure additional funding so that all special needs children may attend regardless of their income, notwithstanding their potential additional needs. In Dade County, where the public school system has established after-school programs in many of its elementary schools, special needs children are assessed the same weekly charges as other participating children. Cooperative efforts between the school district and United Way ensured that no low-income child was denied a place for lack of funds.

Absence Policy: Because special needs children may experience more absences, whether due to increased susceptibility to infection or the need to see specialists of some sort, it is important to establish guidelines for the admission of ill children, to develop a protocol for the care of children who become ill during care, and to spell out payment requirements for absences. All of these policies should be determined prior to the commencement of the program and should be fully explained to the parents.

Medications and Other Specialized Procedures: All programs should require that parents provide: (1) a medical and/or developmental history of their child; (2) information from a physician relating to special diets and/or medication where applicable, accompanied by a parental consent form to administer the medication and the diet to the child; (3) a description of the special needs of the child which are expected to be taken care of by the provider; (4) any activities the child is restricted from engaging in; and (5) any specialized emergency procedures to be used with the child (i.e. procedure in the event of a seizure, diabetic shock, etc.) and (6) the name and phone number of the child's physician. As with any child, the program should have on file a parental consent form to seek emergency treatment in the event parents cannot be reached.

CHAPTER 5

FOOTNOTES

[1]For purposes of this manual, special needs children are defined as those children needing special care because of physical, emotional or health conditions. These conditions include, but are not limited to, communication disorders, developmental disabilities, emotional disturbances, health impairments ranging from allergies to cancer, learning disabilities, physical disabilities and visual impairments. For the federal definition of "handicapped" see Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Section 794).

[2]29 U.S.C. Section 794; Regulations appear at 34 CFR Section 104.1 et seq.

[3]See, e.g., Wolff v. South Colonie Central School Dist., 534 F.Supp.758 (N.Y. 1982) where an optional trip to Spain was held to be an activity receiving federal financial assistance within the meaning of Section 504 since "although the students pay for a substantial portion of the expenses of the trip, regular salaried teachers will be attending as chaperones while school is in session, the School District has sponsored and planned the program, and students will be under the supervision of teacher and School District personnel during this trip (citation omitted)." Id. at 761. See also 45 CFR 84.3(f) for the definition of "recipient" and 45 CFR 84.3(n) for the definition of "Federal financial assistance."

[4]Grove City College v. Bell, 52 U.S.L.W. 4283 (February 28, 1984).

[5]20. U.S.C. Section 1401 et seq.

[6]The definition of "handicapped" differs from Section 504. See 34 CFR Section 300.5 20 U.S.C. Section 1401 et seq. Regulations appear at 34 CFR Section 30.1 et seq.

[7]This age range is of some importance, as regulatory schemes for school-age child care may be restricted to those between 4 or 5 and 12 or 13 years of age. Many of the special needs children most in need of school-age child care are those who are in the age ranges beyond which other children no longer are in need of adult-supervised care.

[8]See Massachusetts Office For Children 102 CMT 7.06, 7.07.

[9]See Illinois Section 407.26.

[10]See Section on Liability Considerations, which discusses the standard of care owed special needs children and Appendix D which suggests preventive measures which can be taken to minimize liability for all children.

CHAPTER 6

ANTITRUST/UNFAIR COMPETITION AND RELATED CONSIDERATIONS

> If his competition had been a person or corporation which by reason of owning a more commodious and sanitary hall or one more centrally located had attracted business away from his opera house he would have no ground for legal action. Neither can there be ground for complaint here if the schoolhouse is being used in a manner and for a purpose authorized by law.
>
> Beard v. Board of Education, 16 P.2d 900 at 902 (Utah, 1932).

Legal challenges to the provision of child care in the public schools have generally proceeded under one or more of the following theories: 1) That public schools lack the authority to provide such care; 2) that charging for programs violates the right to a free public education;[1] 3) that subsidies, whether direct or indirect, constitute illegal expenditures of taxpayer dollars;[2] 4) that fee-based programs which bring in revenue have the effect of transforming public schools into commercial enterprises in violation of their statutory mandate;[3] 5) that subsidies, whether direct or indirect, give schools an unfair and illegal advantage over private, proprietary programs. The first theory has been thoroughly reviewed in the Section on Enabling Considerations. It is well settled that statutory language can, and in most cases does, confer on school boards the authority to become involved in the provision of child care. It is the last theory, dealing with unfair competition and related considerations, which will be discussed here.

I. Antitrust

No school-operated or contracted-out child care program has ever been challenged under federal or state antitrust laws. Because private operators would face enormous difficulties establishing the anticompetitive effect and damages necessary to sustain an antitrust claim, it is very doubtful that any challenge of this nature would succeed.

However, recent decisions in antitrust law have chipped away the relatively ironclad antitrust immunity that municipalities enjoyed in the past. In 1943, the Supreme Court, in Parker v. Brown,[4] ruled that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by the legislature."[5] It was assumed that this "state action" exemption also applied to municipalities, as subdivisions of the state. Nevertheless, in 1978, the Supreme Court in City of Lafayette v. Louisiana Power and Light Co.[6] ruled that "the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions, pursuant to a state policy to displace competition with regulation or monopoly public service."[7] Thus, City of Lafayette requires that in order for a municipality (and presumedly its subdivisions, such as school districts) to be exempt from antitrust attack, it must demonstrate that its activities are pursuant to a clearly articulated state policy to take over this field of endeavor. Nevertheless, as mentioned above, under current conditions, it is unlikely that a private operator of school-age child care could establish an antitrust claim against a school district delivering child care services, given the lack of monopolization or anticompetitive conduct.

When the program is operated by an independent non-profit, it is doubtful that such a program would be subject to antitrust attack. As the court held in Marjorie Webster Jr. Col. v. Middle States Ass'n. of C.& S.S.,[8]

> (A)ppellant's objectives, both in its formation and in the development and application of the restriction here at issue, are not commercial . . . Of course, when a given activity falls within the scope of the Sherman Act, a lack of predatory intent is not conclusive on the question of its legality. But the proscriptions of the Sherman Act were "tailored . . . for the business world," not for the non-commercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.

II. Unfair Competition

Claims of unfair competition directed against the public schools by private child care operators generally proceed from opposing positions. On one hand, the proprietary operators claim there is unfair competition because the indirect and direct subsidies to programs (free or reduced rent, utilities, janitorial services, etc.) enable schools to charge less for their programs, giving them a competitive edge. On the other hand, when schools charge fees which more than defray the costs of operating the program, operators have charged the schools with becoming commercial enterprises while unfairly retaining the advantages of taxpayer support and tax exemption.[9]

The definition of what constitutes unfair competition varies widely from state to state and as always, it is important to carefully check your state's statute. Courts have uniformly rejected the notion that public school activities which simply replicate activities performed by private proprietary organizations, constitute unfair competition. An old case from Utah which concerned student organization sponsorship of various types of after-school entertainment in the school auditorium summed up this view best when it declared:

> It is contended by plaintiff that to use a tax-exempt, tax-supported institution to compete with a taxpayer is manifestly unfair and constitutes unfair competition. If the use made of the school building and grounds is lawful, it matters not that such use is competitive with plaintiff's opera house, or that plaintiff's income has been impaired by such competitive use. When free public schools were first established, they competed with and ultimately drove from the field numerous private schools, but those who conducted the private schools could not complain of unfair competition since the state had the right to establish the free school system. Universities and colleges established by the states are in direct competition with privately controlled colleges, but the competition is not unfair nor unlawful because the state has the power to establish its universities and colleges, and to support them by taxation.
>
> Beard v. Bd. of Ed., 16 P.2d 900 at 902 (Utah, 1932).

Recent courts have ruled similarly, holding that once authorized by statute, child care provision by the schools will not constitute unfair competition with private operators. Kiddie Korner v. Charlotte-Mecklenburg, 285 S.E.2d. 110 (N.C. 1981); Arkansas Prof. Childcare Assn. v. Little Rock School Dist. (unpublished, 1981). In essence, these decisions declare that private operators have no right to be protected from competition. Nonetheless, it is advisable for the protection of the school that it have documentary evidence of the need for the child care services it is offering, for as the court in Beard noted, "(W)hile it is within the discretion of the board of education to permit the giving of picture shows and dances, of the ordinary competitive kind, in the schoolhouse, yet the board in the exercise of a wise discretion ought not to use school property for such entertainments where the community is adequately served."

III. Business Torts

Related to unfair competition are other legal theories, generically known as business torts. They include interference with contractual relations, and interference with prospective business advantage.[10] In most cases, these torts can either be the result of intentional or negligent actions. Interference with contract is defined as words or actions by the defendant which interfere with an existing contract of the plaintiff's and which cause the plaintiff damage. In the case of prospective business advantage, there need not be a contract involved. While the chances of being sued under such theories are remote, a prudent school will protect itself by doing the following:

(1) Survey its community so that it can document that it is serving a genuine need that is not currently being met;

(2) Seek enrollment through its own class lists and through general announcements to the community rather than targeting children already enrolled in existing after-school programs; and

(3) Refrain from criticizing programs which may be hostile to the school's undertaking. Programs should simply stress their own positive qualities.

CHAPTER 6

FOOTNOTES

[1]See Kiddie Korner Day Schools Inc. v. Charlotte Mecklenburg Board of Education, 285 S.E.2d 110 (N.C. 1981) appeal dismissed, review denied 291 S.E. 2d 150.

[2]Id.

[3]Id.

[4]317 U.S. 341 (1943).

[5]Ibid. at 350.

[6]735 U.S. 389 (1978).

[7]Id. at 413.

[8]432 F.2d 650 (D.C. 1970)

[9]See case cited in footnote 1 above.

[10]Business torts could also include injurious falsehood, misrepresentation, deceit, etc.

CHAPTER 7

STAFFING CONSIDERATIONS

A good child care staffer is interested in children, has the capacity to enjoy them, to understand their problems, to respect their individual personalities and cultural differences, to discern their feelings and needs, to be sympathetic, sensitive, flexible, dependable, objective, consistent, mature, willing to learn, able to learn, resourceful, creative, non-punitive but firm, pleasant and cooperative with other adults, capable of handling emergencies, able to accept violently expressed feelings, of good physical and mental health, warm and spontaneous.

Evans, et al., Day Care: How To Plan, Develop and Operate A Day Care Center (Boston: Beacon Press, 1971), p. 58.

For all this training and skill,

The average child care giver receives less than the minimum wage, works an exhausting 8 to 10 hours a day, has no substitutes or paid vacations, and no job security or health or retirement benefits.

Statement by Ohio AEYC, November 1982.

Staffing of SACC programs can be a challenging task because it requires consideration of a number of factors. These include the needs of the community being served, the nature of the organization operating the program, the type of program offered, the level of training required of staff, licensing requirements at a variety of governmental levels depending on the state in question, the age range of the children served and the program's budget.

Staffing the Program

Although school-operated programs often have the option of staffing their programs with personnel from existing staff (classroom teachers, art teachers, physical education teachers and/or teacher's aides), this may not always be the ideal solution. Some programs have chosen to hire all outside personnel while others operate with a mix of existing and new personnel. Deciding which alternative is appropriate requires a careful analysis of your particular circumstances. Irrespective of the option chosen, it is important to have clear lines of communication among the program's staff, supervisors and public school administrators.

When the school decides to operate a program and school staff is unionized it is essential to review all existing collective bargaining agreements to determine whether any of the agreements affect the hiring of personnel for the SACC program. Hiring of certified classroom teachers (or other existing personnel) or paying according to a specific wage scale will depend upon the existence of a collective bargaining agreement (or regulatory scheme) which requires it.[1] Currently, many collective bargaining agreements provide that certain extracurricular activities will be supervised by teachers who request these assignments. However, these teachers generally sign a supplemental contract that incorporates a compensation schedule which is independent of the wage scale for the performance of regular teaching duties. Whether school-operated programs will be considered "extracurricular activities" or "special supplemental assignments" subject to a union agreement (which may require the hiring of existing staff) is a determination which will depend on your school's existing collective bargaining agreement. Thus, these agreements should always be reviewed. Similarly, where existing personnel are not unionized, it will be important to check the individual employment contracts in use to determine if they affect staffing of school-operated school-age programs.

When a school has no current legal obligations to hire existing personnel, it may choose to hire outside personnel. There is a broad consensus that quality SACC programs should not be mere extended versions of the regular instructional school day. Often, choosing outside personnel arises from a need for staff with qualifications different from those commonly found in the school's current employees. Due to the high level of energy required to perform such work effectively,

child care workers should generally not work with children more than six to seven hours a day. Thus, teachers who are currently working with young children during regular school hours may be too fatigued to work effectively in after-school programs.

When the school chooses to contract with another agency to operate the program, it will need to clarify its relationship in a written agreement. (See Rental Agreement/Leasing/Contracts Section.) The status of the personnel and the conditions of their employment should be addressed in this agreement. For example, to immunize the school from liability, an agreement should include provisions which specify that the employees of the program are not employees of the public school.[2]

Other Staffing Needs

In addition to the staff involved in the day-to-day running of the programs, administrative personnel, secretarial support and janitorial assistance are also required. When the school operates the program and seeks to utilize existing personnel, it will have to review its existing contracts to determine its ability and/or obligation to hire and pay such staff for this program. When the school does not operate the program, it must be certain to specify in contracts with outside groups who is responsible for such items as payment of janitorial services and janitorial coverage for those days the public school is not in session if the SACC program is in operation on these days (vacation, legal holidays, etc.).

Use of Volunteers

The use of volunteers in SACC programs, whether operated by public or private agencies, makes eminently good sense, particularly in light of the limited resources being directed towards child care. Nonetheless, the use of volunteers is not without its pitfalls. SACC programs should be certain that those who volunteer are dependable and if they are volunteering to work with children, that they have experience dealing with children. However, volunteers can also be used to help improve the facilities, to provide clerical support and other non-child contact positions. An interview process can be used to place volunteers in appropriate roles. One should always remember that merely because a volunteer is not paid by the school or any

independent entity operating in school facilities will not necessarily immunize these entities from liability for conduct by or to a volunteer. If a volunteer works under the control and supervision of these organizations, he or she may be considered an agent of the school or the program for purposes of tort liability.[3] Consequently, it is possible that liability will be imposed on an organization if these "agents" engage in tortious conduct while working for the program.[4] Thus, as is frequently the case under existing law, one effectively is penalized for exercising greater care; the more one trains volunteers, sets out criteria for their utilization and exercises control over their activities, the greater the likelihood they will be viewed as agents who are capable of imposing liability on the organization. Nevertheless, such training and supervision is essential if volunteers are to be an asset to a SACC program. Therefore, a program utilizing volunteers should be certain to obtain insurance which covers the acts of its agents, even those who are not salaried.

Employment Agreements: Special Considerations of School-Age Child Care

The usual considerations governing employee contracts will also apply in the area of school-age child care programs.[5] This is a rapidly changing area of law in some states and for this reason employers are cautioned to develop neutral procedures and follow them closely. Employers should be familiar with state and federal laws governing employment. Some of these laws address:

1) Wages;
2) Hours;
3) Fringe benefits;
4) Workers' compensation;
5) Tax liabilities and withholding;
6) Rights of employees to organize;
7) Worker health and safety;
8) Nondiscrimination in hiring, conditions on the job and firing;
9) Unemployment compensation;
10) Disciplining and terminating employees.

The uniqueness of SACC, however, mandates that employers also pay special attention to certain features of this type of work. These features include:

Hours:

1) Part-time nature of work. For many SACC staff, working hours will only be part time, which in some cases will preclude the receipt of certain benefits. By combining jobs or offering longer hours of care, full-time jobs may be created, developing a more committed staff which may help reduce turnover.

2) Split shift nature of work. In those programs which offer before and after school care using the same staff, employers should check state labor laws to determine if their state requires split-shift premiums.[6]

3) Overtime: One perennial problem in child care is late parental pick up. It is advisable to stagger the hours of staff, so that some staff are scheduled to remain at the program site after closing time. This will ensure that an adequate number of employees remain on duty to supervise children in their care until these children are safely released to parents or guardians or in a manner previously agreed to. However, since the problem of late parental pick up is sometimes unavoidable, employers should be familiar with state laws governing paid overtime. If such compensation becomes a burden on the program's operating budget, it may be appropriate to fund this compensation through a penalty-fee schedule imposed on users of the child care program. (When a program decides to impose such a penalty fee for late pick up or to terminate providing services after repeated late pick ups, it is essential to notify parents ahead of time about these policies in a clear manner. It is preferable to put such policies in writing.

4) Ten Months (or School-Year) Employment: It should be specified that the terms of employment are a) twelve months (if the program operates in the summer), b) ten months, or c) that salaries are offered to staff on an annualized basis of either twelve months or ten months (even when the program is not operating during the summer). If the program operates for ten

months only, it may be unclear if that constitutes a situation in which staff are eligible for unemployment compensation. To provide this clarity, it will be important to review your state's unemployment benefit statutes.

Breaks and Substitutes: Employers should be familiar with employees' rights to paid breaks. In order to ensure compliance with these laws and to ensure staffing at all times which meets licensing requirements, it will be necessary to schedule breaks when other staff or administrators are free to cover for staff who are not present. This will also be true when staff are absent. Thus, it is essential to make provisions for substitutes at the site, and see that there is a list of substitutes who are on call. Every program should spell out its policies with respect to breaks and substitutes and see to it that all staff are familiar with these policies.

Specialized Personnel: When special needs children are served by the program, it will be necessary to be certain that personnel hired are capable of meeting their needs or that in-service training be conducted to develop skills of existing staff members. However, it should be noted that compensated in-service training should be part of any quality program, regardless of the children in care.

Coordination of Programs

To minimize antipathy (if such exists) between school personnel and SACC personnel, contracts for SACC should spell out the obligations of both SACC personnel and regular staff. This is essential, for when two programs utilize the identical space at different times, property and territorial problems frequently arise. Contracts should include guidelines relating to confidential information about children received by both program staff and regular school staff. This is an issue for many program staff, particularly when parents feel more comfortable talking with program staff about their children than with their children's regular school teacher. Since each program and its host school will be different, each should be able to design an approach that best suits its needs. Irrespective of the confidentiality requirements agreed upon, it is essential that regularized communications between the regular instructional program and the SACC program be instituted to ensure maximum cooperation and minimum friction.

Grievance Procedures

Despite the best of intentions, staffing problems can and do develop. While an institutionalized communication system is necessary, it is not sufficient. Programs should also develop a grievance procedure which provides staff with a fair method of resolving disputes as they arise. This grievance procedure policy should be known and understood by all staff.

CHAPTER 7

FOOTNOTES

[1]See, e.g. California Teachers Assn. v. Board of Ed. of the Glendale Unified School Dist., 109 Cal.App.3d 738 (1980) (Where public school operated its own limited summer school but granted use of school facilities to private organization for operation of summer school classes, the grant-of-use agreement was held not a breach of teacher's collective bargaining agreement. However, because of the language of the collective bargaining agreement, the court stated in dicta that its position would have been contrary had the private organization's operation of summer school been part of the school district's summer school on a subcontract basis.) Id. at 750.

[2]See footnote 1.

[3]This control need not be exercised to impose liability. In some states, liability may exist if there is the right to control. Malloy v. Fong, 37 C.2d 356 (1951).

[4]See, e.g., Malloy v. Fong, 37 C.2d 356 (1951). (Liability imposed on Presbytery of San Francisco for negligence of volunteer divinity student in causing an auto collision while transporting plaintiffs from church to recreational grounds as a part of a Bible school program.)

[5]An excellent source for information on the wide range of child care staffing concerns is the Child Care Staff Education Project, P.O. Box 5603, Berkeley, California 94705. It produces a number of informative handouts on such topics as "Break Policy," "Employment Rights," "Special Stresses of School-Age Child Care" and the like. The Project should be contacted directly for a list of its publications.

[6]See, e.g. Cal. Industrial Welfare Commission, Order No. 4-80 Section 4(c), Title 8 Cal. Admin. Code Section 11345.

CHAPTER 8

RENTAL AGREEMENT/LEASE/CONTRACT CONSIDERATIONS

> **Written agreements provide an opportunity to anticipate problems that may come up in the course of time; spell out the specific details of the sharing of resources and responsibilities; and provide a reference when, at a later time, the rationale for a particular decision is questioned.**
>
> Baden, et al., School-Age Child Care: An Action Manual (Boston: Auburn House Pub. Co. 1982) p. 144.

When a school chooses to have another group operate school-age child care using its facilities, it should be certain to memorialize its understandings in a written agreement. This is so whether the school plans a joint venture or only seeks to allow an independent group to utilize its surplus space. Not surprisingly, the fundamental purpose of such an agreement is to consider problems before they arise and allocate responsibilities to minimize uncertainty and confusion. How well your agreement accomplishes these objectives depends primarily on your knowledge of how SACC operates, your ability to foresee possible problem areas and your ability to translate these concerns into the written agreement.

RENTAL AGREEMENT/LEASE

Rather than set out a model lease here (see Appendix E), what follows are some of the provisions which should appear in a rental agreement or lease, with special reference to their importance in the area of SACC.

1. Description of Premises to be Leased and Their Permissible Uses

As with any lease, it is important to clearly specify the area which can be used. It is particularly essential to specify with respect to SACC programs what facilities of the school

are available: vacant classrooms (which ones), access to telephones, restrooms, cafeterias, auditoriums, gymnasiums, swimming pools, playground, parking lots, employee lounges, etc., and any special requirements governing the use of each of these. This might also include some mention as to what, if any, modifications or improvements may be made. Finally, the lease should also specify hours of use.

2. Term

What differentiates mere rental of space from a lease is the specification of a term. When leasing space to a SACC program, the term should be for a minimum of two years. In this way programs can develop and plan for the future without undue concern for locating space. For the same reasons, there should be a provision for mutual termination upon at least sixty days notice. Furthermore, in defining the term, there is a need to decide whether the space/facilities are available for the calendar year or the school year and whether the program operates when school is not in session.

3. Cost of Space

Depending on the type of program offered space, the school may choose to forego the collection of rent, it may require payment of nominal rent, postpone collection of rent during the start-up phase, or rent can be tied directly to child care revenues, etc. Requirements for rental rates may be specified by enabling legislation or by school board resolution, so it is important to check these. Any agreement on costs/rent should specify exactly what it covers -- space, utilities, janitorial services, etc. The agreement should also specify what happens in the event the space becomes unusable for a period of time (i.e., due to fire, etc.).

4. Quiet Enjoyment

Particularly in instances in which the program is planning on operating when school is in session (i.e., for kindergarteners or those in the early primary grades who may have early dismissal) it is important to specify that the program will not interfere with the ongoing instructional program.

5. Allocation of Responsibilities

The lease should specify who has which type of maintenance obligations; who has responsibility for meeting the requirements of applicable licensing, health and safety, fire, building and zoning laws; which existing school regulations apply to the program, etc.

6. Indemnification and Insurance

Each lease in which the school does not operate the program should contain a provision to protect the school against any and all forms of liability that may arise from the use of space by SACC programs. Each lease should also specify that liability and property damage policies should be purchased in a specified amount, naming the school district as the insured.

7. Nondiscrimination Clause

The use of school space/facilities should be made contingent upon a requirement that the group operating the program engage in nondiscriminatory practices respecting enrollment and hiring.

CONTRACTS

Contracts may be used in addition to a lease or they may incorporate many of the same provisions described above. Contracts are particularly important when the school wishes to operate the program jointly or retain some measure of control over the day-to-day operations of the program. A contract, unlike a lease, might include provisions related to school personnel and their responsibilities, hiring of staff, oversight responsibility for the SACC program, health requirements for staff and students, safety and emergency procedures required, use of school-owned equipment, transportation responsibilities, and a myriad of other possibilities.

APPENDIX A

MODEL SCHOOL-AGE CHILD CARE ENABLING STATUTE

Sec. 1 Purpose of Article

In recognition of the growing number of children who have no adult supervision at certain periods when school is not in session, the purpose of this article is to encourage and assure maximum use of the public schools in the establishment, operation of and provision for[1] school-age child care programs. To this end, it is declared to be the policy of this State that each local board of education shall be encouraged to assess its local needs for school-age child care and meet such need as provided for in this article.

Sec. 2 Authority and Responsibilities of State Board and Local School Boards of Education

Local school boards[2] shall have the power to establish and operate, contract for and/or make provision for programs and auxiliary services[3] which provide before- and after-school and vacation instruction and care for children residing in the district.

The local boards shall adopt rules and regulations governing these programs, including an application and contracting procedure by which qualified groups may apply to operate them, as it deems best, provided that programs operated by or contracted for by local boards shall meet the minimum standards for such programs as are established by the (insert relevant state regulatory agency) and any other applicable laws and regulations.

Except as otherwise provided by state or federal law, when the school itself operates the program, school boards may fix reasonable charges for the instruction and care of children attending these programs.[4] When other groups, agencies, or entities operate the program, these groups, agencies or entities shall have the authority to set fees. The board may, if necessary, supplement the funds established by these programs by accepting monies from any community, state or federal

agency or by making an appropriation from the general school fund of the school district. Any fees collected by, or monies granted to, these programs shall be used exclusively for the support of such programs.

APPENDIX A

FOOTNOTES

[1]This might include leasing surplus space, or providing transportation assistance, for example.

[2]Known also as school committees, boards of directors, boards of trustees.

[3]These could include transportation, etc.

[4]See Chapter 2, footnote 1.

APPENDIX B

MODEL SCHOOL BOARD RESOLUTION

SCHOOL-AGE CHILD CARE PROGRAMS IN PUBLIC SCHOOL FACILITIES[1]

WHEREAS: There is a documented unmet need in this community for supervised programs for school-age children when school is not in session, and

WHEREAS: The public schools are a logical site for the provision of care because of:

(1) their underutilized space and facilities which are already school-age appropriate;

(2) their ease of accessibility to children throughout the community;

(3) their ability to provide continuity to children who may already be involved in extracurricular activities at the school;

(4) the ability of such programs to enhance school achievement and reduce school vandalism, and;

(5) the unique configuration of their resources for, expertise in, and familiarity with children; and

WHEREAS: The provision of such care in public schools, whether by the schools themselves or other eligible entities, serves a public purpose,

THEREFORE BE IT RESOLVED:

That the Board of Education hereby encourages the use of public school facilities for school-age child care programs. Such programs may be established and operated by schools within this district or they may be

established and operated in cooperation with eligible users.[2] Such programs may operate before, during, and after school hours, as well as during vacation session, subject to the requirement that they do not interfere with regular school instruction or ongoing school activities. Enrollment shall be open to all school-age children in the district and every effort shall be made to ensure that no child shall be denied participation in these programs because of inability to pay. There shall be no discrimination either in enrollment or hiring. Programs shall operate in conformity with all pertinent school regulations and local and state laws, including any zoning and licensing requirements; and be it further

RESOLVED:

That if such programs are undertaken by entities other than the schools themselves, that they are to be given priority in any leasing policy, second only to educational programs which are an integral part of the school's instructional function; that leases or contracts may be negotiated with such programs which do not recover all costs; and that any such leases or contracts incorporate a provision which will protect the school system and school board from any and all forms of liability that may arise out of the use of such space, as well as require providers to purchase adequate insurance naming the school board and district as the insured; and be it further

RESOLVED:

That this resolution be implemented through the guidelines and procedures established by the superintendent of schools which are incorporated by reference herein; and be it further

RESOLVED:

That the superintendent submit quarterly reports on the use of surplus space; and be it further

RESOLVED:

That this board shall annually review the guidelines and procedures established by the superintendent with respect to SACC programs to ensure their continued effectiveness.

APPENDIX B

FOOTNOTES

[1]The resistance of some schools to becoming involved in "child care" should not be an insurmountable obstacle. Such a resolution could just as easily be titled Before and After School Programs, Extended Day Programs, etc.

[2]Eligible users may be defined in the Resolution or in the regulations.

APPENDIX C

AN EXAMPLE OF GUIDELINES FOR THE OPERATION OF SACC PROGRAMS

WITHIN PUBLIC SCHOOLS BY INDEPENDENT GROUPS

I. Purpose

To provide for the leasing of surplus public school facilities and space for SACC programs by independent organizations or groups in conformity with the School Board Resolution Encouraging the Use of Public School Facilities for SACC Programs.

II. Guidelines

A. Determination of Eligible Users

An applicant group must be a bona fide non-profit organization having or in the process of seeking tax-exempt status. It must agree to accept all responsibilities required by educational, local and state agencies governing the operation of SACC programs. It must be sufficiently financially stable to pay for the cost of obtaining a license and to pay for necessary insurance as prescribed. The applicant group must open its program to all school-age children within the area which the school serves and make assurances that it will employ every reasonable effort to ensure that no child shall be denied participation in the program because of lack of funds.[1]

B. Application Procedure

Applicant groups shall contact the coordinator[2] specified in "D" below to express their interest in establishing a program. The coordinator will confirm the availability of space and confer with the principal of the individual school to satisfy any of his/her concerns.

Applicant groups will make available to the coordinator the following:

* Name of program
* Name, address, telephone of contact persons and staff
* If incorporated, articles of incorporation
* License or application for license (if required)
* Papers demonstrating tax-exempt status or application for tax-exempt status
* Outline of program to be offered
* Fee schedule
* Liability insurance policy in the amount of ($500,000) naming the District as the insured

C. Rental Agreements/Lease/Contracts[3]

The coordinator will negotiate a rental agreement/lease/contract with acceptable applicants. The agreements shall be coordinated with other uses of the building and shall contain the following:

* Description of property to be leased
* Duration of lease--minimum of two years. Mutual termination upon sixty days notice. Clarification of 10 or 12 month lease
* Hours of use: use when school is not in session
* Non-discrimination clause in hiring and enrollment
* Provision to "hold the school system harmless" against any and all forms of liability that may arise from the use of space by SACC programs
* Insurance provision, specifying type and amount, with district named as insured
* Prohibition against subleasing without prior permission of district
* Permissible uses of space--what facilities, any modifications permitted
* Use of school equipment
* Description of obligations/responsibilities of both parties--maintenance, repairs, payment of rent if space should become unusable, etc.
* Cost of space, with possible waiver, deferral or reduction of rent
* Agreement to follow rules and regulations as specified in Section E
* Parking access by SACC personnel
* Quiet enjoyment--program will not interfere with regular instructional program; school will not interfere with quiet enjoyment of space by SACC program
* Periodic review of lease

Such agreement must be approved by the school board.

D. A person shall be designated coordinator or liaison between the public schools and independent groups seeking to establish SACC programs. He/She will be responsible for:

* Identifying all usable surplus space and/or facilities which are appropriate for SACC and is available for a minimum of two years;

* Notifying all affected school principals of the availability of space and/or facilities;

* Notifying parents, child care providers and community agencies of the availability of space and/or facilities;

* Negotiating the rental agreement/lease/contract between the public school and the SACC program;

* Acting on complaints by the SACC program respecting the public school's obligations under the contract and/or lease if they cannot be resolved at the level of the school principal.

* School principals shall act as the coordinator's liaison in the day-to-day operations of the SACC program at the individual school building.

E. Operation of Programs

The coordinator will work with individual school principals to ensure that the SACC programs operate in conformity with all appropriate rules and regulations and do not interfere with ongoing instruction. Prior to occupying public school space each independent group will receive a set of rules and regulations governing the operation of the program. In addition to the lease provisions above, the rules and regulations cover such additional areas as safety and emergency procedures including authorizations to seek emergency medical treatment.

APPENDIX C

FOOTNOTES

[1]Each school board will have to determine for itself what types of organizations will be deemed "eligible users." Prior to making such a determination it should review its state enabling legislation as this may restrict which groups are eligible. Additionally, as more groups seek to utilize surplus school space, competition in procuring limited space will grow. Therefore, school boards need to establish priorities for space utilization which reflect community needs and desires.

[2]Depending on staffing, this coordinator could be the school principal the superintendent, or newly hired staff.

[3]The specifics to be fleshed out in the rental agreement/lease/contract and accompanying rules and regulations may not be self-evident, as there are unique considerations in operating these programs. Some of these specific considerations will be found in the Chapter on Rental Agreements/Leases/Contracts.

APPENDIX D

A CHECKLIST

AREAS OF CONCERN FOR SCHOOLS AND SACC PROGRAMS

What follows is a checklist of areas which are of particular concern to SACC programs and the preventive measures within each area which can minimize liability. Relevant case references appear as footnotes. The list has been culled from licensing statutes, particularly Virginia and Illinois which are especially comprehensive, regulations from other states and particular concerns which have been expressed to the author. The checklist should be used only as a guide and not adopted verbatim; it is not comprehensive nor is it wholly applicable to every program. Each SACC program should be aware that while compliance with licensing statutes is the starting point to minimize liability, it alone is not absolute insurance against lawsuits. Since every program is unique, no checklist will suffice; instead every program should thoroughly review every aspect of its program before and during operation.

SITE

No child care center shall be located where conditions exist that would be hazardous to the physical or moral welfare of the children.

It is particularly important that such a site not have toxic hazards.[1]

There shall be a safe, sanitary, and adequate play area.[2]

Play space shall be safely enclosed or otherwise protected from traffic and other hazards.[3]

FACILITIES

Any thermal hazards (radiators, hot water pipes, steam pipes, heaters, fans) in the space occupied by children shall be

out of the reach of children or be separated from the space by partitions, screens, or other means. Gas stoves, coal stoves, oil stoves, and electric heaters, if used, shall be approved by the fire official responsible for inspecting for fire hazards.

There shall be adequate lighting.

Appropriate safeguards such as, but not limited to, screens, gates, and handrails shall be installed at hazardous windows, doors, stairways, and openings such as walks and cellars and shall be acceptable to existing fire and building codes.[4]

There shall be a separate room for isolation of children in case of illness.

Swimming pools, if provided, shall be enclosed with safety fences and shall conform to local health and safety regulations.

The facility should be inspected for toxic hazards (asbestos in school building, etc.)[5]

EQUIPMENT

Activity areas, equipment, and materials shall be arranged so that staff can be easily aware of the child's presence and activity at all times.

Outdoor equipment shall be placed so as to avoid collisions and accidents while still permitting freedom of action by the children. Outdoor equipment shall be free of toxic hazards.[6]

Supports for climbing apparatus and large equipment shall be securely fastened to the ground.

Equipment should be regularly inspected to learn of defects or repairs needed, particularly wooden play structures.

There shall be a soft, resilient surface or a pad under all climbing equipment from which children may fall.

Equipment such as electrical appliances, etc. should be stored when not in use.

It is important to understand that if school personnel are aware of some faulty condition in the site, facilities and/or

equipment, they will not necessarily protect themselves by posting warnings since written warnings may be insufficient for minors.[7] Playgrounds and the like should be secured to prevent or limit access when supervision is unavailable.

STAFF QUALIFICATIONS

No individual shall be in contact with children cared for in a day care center who, within the preceding ten years:

1) Has been identified through court (juvenile, criminal, civil) proceedings as having been a perpetrator of child abuse, child neglect, or child sexual abuse; or

2) Is awaiting an investigative decision or trial on such charges;[8]

3) An individual convicted of crimes other than those in (1) above, will not automatically be prohibited from contact with children cared for in a day care center solely because of the conviction. Instead, the governing body or its authorized representative shall consider the following:

   A) The type of crime for which the individual was convicted;

   B) The number of crimes for which the individual was convicted;

   C) The nature of the offense(s);

   D) The age of the individual at the time of conviction;

   E) The length of time that has elapsed since the last conviction;

   F) The relationship of the crime and the capacity to care for children;

   G) Evidence of rehabilitation; and

   H) Opinions of community members concerning the individual in question.

4) Substitutes shall have the same personal, health, administrative, and professional qualifications required of staff for whom they substitute.

5) Volunteers shall meet the same personal and health requirements required of other staff.

STAFF/SUPERVISION

Staff orientation and training should include clear ground rules as to what constitutes adequate supervision, dictating, for example, that children never be unattended while on the playground. Specific standards should be maintained to govern supervision in a variety of situations, such as use of the bathrooms, traveling from one area of the building to another, or going on field trips. Child/staff ratios should comply at all times with licensing requirements; however certain situations or activities will require ratios much better than those mandated.[9]

When the play area does not adjoin the facility, there shall be sufficient staff supervision for the children's safety both during play and traveling to and from the play area.[10]

If there is a pool which exceeds three feet of water in depth, a water instructor or Senior Life Saver certified by such organizations as, but not limited to the Red Cross, shall be on duty at all times the pool is in use.

RECORDS

Each center shall maintain and keep at the center a permanent and separate record for each child. All records shall contain:

1. Identifying information including name and nickname (if any), sex and birthdate of the child;

2. Name, home address, and telephone number of parent(s), guardian(s), or agency holding custody;

3. Place and telephone number of parent's(s') or guardian's(s') employment and working hours;

4. Name and telephone number of family physician;

5. Name, address, and telephone number of some designated person to call in an emergency if parent(s) or guardian(s) cannot be reached;

6. Legal guardian(s) of child if custody has been removed from either or both parents;

7. Names of persons authorized to call for child as well as those not permitted to visit;

8. Date of admission;

9. Date of termination of enrollment;

10. Medical records (see Health Standards) including pertinent information required for children with special needs (medication, diet, etc.);

11. Scheduled days and hours of care.

A facility shall maintain accurate daily attendance records on all children enrolled. If a child attends on a part-time or irregular basis, this shall be recorded in the attendance record.

Accidents or illnesses which have occurred to the child at the facility shall be recorded in the file. When a child is not permitted to attend the facility because of an accident or illness, the date of readmission to the facility shall be recorded.

The day care center shall enter in the child's record and orally report immediately to the child's parent, guardian, and the Department any serious occurrences involving children. Oral reports shall be confirmed in writing within two working days of the occurrence. If the center is unable to contact the parent, guardian or Department immediately, it shall document this fact in the child's record. These occurrences include serious accident or injury requiring extensive medical care or hospitalization; death; arrest; alleged abuse or neglect; major fire or other emergency situations.

Written agreements and consents as required shall be in a child's record file.

AGREEMENTS/RELEASES/AUTHORIZATIONS

There shall be the following written agreements between the parent(s), guardian(s), responsible person(s), or agency holding custody and the child care center at the time of the child's admission:

An agreement authorizing emergency medical care if an emergency occurs when the parent(s), guardian(s), or responsible person(s) cannot be located immediately;

A parent may request that immunizations, physical examinations, and/or medical treatment be waived on medical or religious grounds. A request for such waiver shall be in writing, signed by the parent, and kept in the child's record.

An agreement that the child care center will notify the parent(s), guardian(s), or responsible person(s) when the child becomes ill and that the child will be picked up as soon as possible; and

An agreement authorizing the child care center to allow the child to participate in duly authorized field trips when feasible, with prior notice given as to where and when such field trip will occur.

The center shall have on file a written, signed permission from parent(s) or guardian(s) for all children participating in swimming or wading activities.

There shall be a written agreement between parent(s), guardian(s), or responsible person(s) or agency holding custody and the child care center authorizing the child care center to allow the child to participate in specific community activities such as, but not limited to Scouts, "Y," church, or to music lessons.

Nonprescription drugs, including but not limited to vitamins and aspirin, may be given to a child only with the parent's(s') or guardian's(s') written consent. Prescribed drugs shall be given to a child only in accordance with a signed doctor's order or authentic prescription label and with the parent's(s') or guardian's(s') written consent. A copy of such written permission shall be filed in the child's record.

Use of facility transportation, if applicable.

Use of photographs of children for publicity purposes, if applicable.

Child's involvement in research, if applicable.

Daily Release of the Child

A child shall be discharged from the facility only to the child's custodial parent(s) or guardian or to a person designated in writing by the parent(s) or guardian to receive the child.

Such authorization shall include the time that the child is to be released and the means of transportation the child is to use.

The staff shall refuse to release a child to any person, whether related or unrelated to the child, who has not been authorized, in writing, by the custodial parent(s) or guardian to receive the child. Persons not known to the staff shall be required to provide a driver's license (with photo) or photo identification card to establish their identity prior to a child's release to them.

When a child is released, in accordance with the written instructions of the parent(s) or guardian, to a person other than the parent(s) or guardian, the facility shall maintain a record of to whom the child was released, and the date and time that the child was released.

GENERAL HEALTH STANDARDS

Staff

Each employee and regular volunteer (i.e., assuming staff duties on a scheduled basis) who comes into contact with the children and each staff person responsible for the preparation and serving of food, shall have at the time of employment or no more than six months prior to employment, and annually thereafter*, a physical examination, which shall be dated and signed by the examining physician and shall indicate that:

*The cost of obtaining this "health clearance" may be prohibitive for employees unless covered by insurance. Consideration shall be given to employer coverage of these expenses.

a. He/she is in good health and free from communicable disease;

b. He/she is determined to be free from tuberculosis in accordance with the acceptable methods of the state's Department of Health; and

c. He/she is free from any physical or mental conditions which could affect the ability to perform assigned duties and adequately protect the health and safety of children.

Staff shall undergo reexamination whenever a communicable disease is suspected.

A staff member experiencing fever, sore throat, vomiting or diarrhea shall not be responsible for food handling or the care of children.

Children

1. Medical Certificate and Immunizations

   a. Within 30 days before or after admission and annually thereafter, each child shall have a physician's examination by a physician licensed to practice medicine, using State Health Department's prescribed screening examination.

   b. The report of the physician's examination shall indicate that the child has had immunizations in accordance with state requirements. It shall also include any chronic conditions or defects that are present, any recommended treatment, and any recommended diet.

   c. With respect to the common childhood diseases, such as measles, mumps, chicken pox, etc., the State Health Department recommendations for exclusion from the center shall be followed.

2. Illness and Accidents

   1. An operable telephone shall be on the premises, easily accessible for use in an emergency.

2. The phone number of a doctor or hospital shall be posted in a conspicuous place for use in case of serious accident or illness. The phone number of an ambulance or rescue squad service, the fire department, and the police shall also be posted in a conspicuous place. The parent(s) or guardian(s) of the child shall be notified as soon as possible of any accident or illness.

3. There shall be posted emergency plan for evacuation, and monthly fire drills shall be conducted at the center for the purpose of removing children from the center as quickly as possible.

4. Any child showing signs of illness shall be isolated until he/she leaves the child care center. A staff member shall be available to comfort and observe him/her periodically. Every attempt shall be made to contact the parents and remove the child from the facility as soon as possible unless the program regularly provides sick care.

5. If children have been exposed to a communicable disease within the child care center, parents of enrolled children and incoming children shall be notified.

6. Immediate treatment shall be obtained for any child who sustains a bite or scratch from another child or from an animal. In addition, the child's parent(s) shall be notified. In the case of an animal, the relevant municipal or health official shall be notified.

7. A child who does not appear to be fully recovered from an illness shall not be readmitted to the center unless there is a statement by an attending physician that the child is able to return and participate in the activities of the facility.

MEDICATION AND SPECIAL DIETS

Medication shall be identified, carefully labeled with the child's name, kept out of the reach of other children, even if it must be refrigerated, and be returned to parents when no longer needed.

Medically prescribed diets for children enrolled in the facility shall be provided as ordered by a physician. Such diets shall be on file at the facility and adhered to in preparation and service. Records of food intake shall be maintained when indicated by the physician.

HEALTH EQUIPMENT AND RESOURCES

A first aid kit shall be provided and kept in an accessible place to adults but out of the reach of children. First aid instructional manual, and a State Health Department Flip Chart of Suggestions for Temporary Care of Emergencies in Schools (or similar guide) shall be kept with the first aid kit at all times. A chart giving information on communicable diseases shall be displayed where the first aid kit is kept.

At least one staff member in the Program trained in the administration of first-aid shall be on duty at all times.

FOOD PREPARATION/MEALS & SNACKS

Kitchen areas shall be clean and equipped for preservation, storage, preparation, and serving of food. Provision shall be made for the cleaning and sanitation of dishes.

ENVIRONMENTAL HAZARDS/MISCELLANEOUS

Cleaning fluids, harmful household agents and other hazardous chemical substances shall be kept locked and out of reach of the children.

Sharp scissors, knives, matches, lighters, flammable liquids, drugs, power tools, cleaning supplies and any other such items which might be harmful to children shall be kept in areas inaccessible to children.

All garbage and refuse within the center shall be collected daily and stored in a manner that will not permit the transmission of disease, create a nuisance or a fire hazard, or provide harborage for insects, rodents or other pests.

Toxic paints or finishes shall not be used on walls, window sills, beds, toys or any other equipment, materials or furnishings

which may be used by children or within their reach. Peeling or damaged paint or plaster shall be repaired promptly to protect children from possible hazards.

A safe and sanitary water supply shall be maintained.

Chemicals for insect and rodent control shall not be applied in areas accessible to children when children are present in the facility.

Exit areas shall be kept clear of equipment and debris at all times.

There shall be no smoking in food preparation areas or in child care areas when children are present.

Major cleaning shall not be done while children are present.

TRANSPORTATION

Procedures shall be established and agreed upon in writing by the parents, the school and the SACC program including, but not limited to:

a) Responsibility for transportation of children to the SACC program;

b) Responsibility for transportation of children from the SACC program when the program is over for the day;

c) Responsibility for children leaving school or SACC programs to attend extra-curricular activities, off-site instructional programs, visiting friends, etc.

VEHICULAR TRANSPORT

A center providing transportation services shall comply with the driver licensing, Rules of the Road, financial responsibility, vehicle equipment and vehicle inspection provisions of the state's Vehicle Code.[12]

Programs shall ensure that stops are located at safe sites. The driver of a vehicle transporting children on behalf of a day care center shall be at least 21 years of age and have a valid driver's license.

The driver shall not leave the vehicle unattended at any time while children are in the vehicle.

The driver shall see that each child boards and leaves the vehicle from the curb side of the street and/or is safely conducted across the street.

The driver shall see that order is maintained in the vehicle for safety of the children in transit.

The number of children transported in a vehicle shall not exceed the manufacturers' rated passenger capacity.

Age-appropriate safety restraints which are federally approved and labeled as such shall be used at all times when transporting children.

A vehicle used by the center to transport children shall be maintained in mechanically safe condition at all times.

Any vehicle transporting children to, from, or during a SACC program shall be equipped with a first aid kit.

CONFIDENTIALITY OF RECORDS

Authorized regulatory agency representatives or other representatives who have the agency's written authorization which specifies the statutory authority or administrative rule under which the access is granted shall have access to records and reports. All persons who have access to the records and reports shall respect their confidential nature. All other persons shall be denied access absent an express consent form signed by the parents of the children in care, allowing access by that particular party, specifying the records sought and the period of time such consent covers.

INSURANCE

Each program shall obtain adequate liability, property, accident and vehicle insurance.

An optional plan of accident and/or school insurance should be made available for parents of children in care.

DISCIPLINE

No child shall be subjected, under any circumstances, to corporal punishment inflicted in any manner upon the body or to verbal abuse, or be deprived of regularly scheduled meals or any part of meals or snacks as punishment, or punished for toilet accidents.[13]

APPENDIX D

FOOTNOTES

[1]See, generally, Louis Freedberg, "America's Poisoned Playgrounds: Children and Toxic Chemicals," (Oakland, Youth News, 1983).

[2]In a limited study reviewing claims under child care insurance policies, two-thirds of the injuries occurred on the playground. See Aronson, Susan, "Injuries in Child Care," Young Children, Sept. 1983, p. 19.

[3]Ballard v. Polly, 387 F.Supp. 895 (D.D.C. 1975) (school liable when five-year-old slipped through fence in disrepair; killed by traffic on adjacent road).

[4]In an unpublished case, parents of a two-year-old boy filed a negligence suit for injuries sustained when he fell from a hobby horse and crashed through a low level window at the child care center. The suit alleged the center should have installed safety glass or a device to prevent children from getting near the window, in addition to negligent supervision Harris v. Gerber (Orange Circuit Court, Orlando, Florida, 1982).

[5]The potential liability exposure of schools for injuries to school children as the result of current exposure to asbestos is staggering. Elimination of the hazard is urgent but also expensive. Lawsuits have already been filed in Philadelphia, Los Angeles and Cleveland by school districts against manufacturers and suppliers of asbestos to pay for the costs of removal and containment.

[6]See footnote 1 above.

[7]Restatements, Torts 2d Section 342, Comment K.

[8]This may be inadequate. A recent suit was filed in California against a licensed child care operator whose husband is alleged to have used the children in care for purposes of child pornography. Previous complaints about the operator and her husband as Foster-care licensees are alleged to have been filed with the police department, but it is alleged these complaints were not recorded and no prosecution took place. Instead, it is alleged the Niemans were able to simply turn in their foster care license and, moving elsewhere, obtain a child care license. Waugh v. Nieman, Contra Costa Superior Court, Docket #245384 (1983). Thus, if background or criminal checks are to have meaning, it is important that complaints be kept on file and that such information be acted upon.

[9]Constant supervision of each child has not been required by the courts. "Schools are not intended to be insurers of public safety," See Narcisse v. Continental Ins. Co., 419 So. 2d 13 (La. App. 1982), but they do owe a general duty of adequate supervision, see Schnell v. Travelers Ins. Co., 264 So. 2d 346 (1972).

[10]Foster v. Houston Gen. Ins. Co., 407 So. 2d 759 (La. App. 1981).

[11]See footnote 1 above.

[12]See e.g., Hanson v. Reedley, 43 Cal. App. 2d 643 (1941).

[13]See Johnson v. Cal. State Dept. of Soc. Services, 123 Cal.App.3d 878 (1981).

APPENDIX E

SAMPLE LEASE

THIS INDENTURE OF LEASE, by and between the Board of Education of the _____ UNIFIED SCHOOL DISTRICT, as Lessor, and _____ School-Age Program as Lessee:

WITNESSETH:

That, for and in consideration of the terms, covenants and agreements hereinafter set forth, Lessor does hereby lease and Lessee does hereby take and hire the following described premises located in the City of _____ _____, State of _____ _____.

(Set out description here)

1. PREMISES AND HOURS OF USE

Lessee shall have said space exclusively, during the hours of 7:00 a.m. to 8:00 a.m. and 11 a.m. to 6:00 p.m. Monday through Friday of each week. During the period _____ to _____ (summer months) lessee shall have said space exclusively, during the hours of 7:00 a.m. to 6:00 p.m. Monday through Friday of each week.

2. TERM OF LEASE

This lease shall be for a period of 2 years from _____ until _____, including the summer months and vacation days when school is not in session.

3. RENTAL

As rental, Lessee shall pay Lessor the total sum of $____. in lawful money of the United States of America, payable at the rate of $____. per month commencing (three months after program start-up) and continuing on the first (1st) day of each and every calendar month thereafter until expiration of this lease.

4. USE OF DEMISED PREMISES

The demised premises shall be used by Lessee for school-age child care programs.

5. UTILITIES AND SERVICES

Lessor agrees to furnish the demised premises with all reasonable utilities, scavenger service and maintenance, and it is understood and agreed that Lessor will provide normal janitorial service, necessary restroom supplies, and keep premises in proper order and repair except as to damage caused by Lessee, other than normal wear and tear, which damage Lessee agrees to repair.

It is further understood and agreed that Lessee will take appropriate measures to conserve and effciently use energy and other resources (i.e., heat, water and utilities) and that the services stated above will be equal to the service standards provided in the _____ Unified School District.

6. ASSIGNMENT OF LEASE

Lessee shall not assign this lease nor sublet the demised premises without the prior written consent of Lessor, which shall not be withheld unreasonably.

7. ALTERATIONS AND ADDITIONS BY LESSEE

Lessee, with the prior written consent of Lessor, may, during the term hereof, make alterations, attach fixtures and erect additions or structures in or upon said premises provided that same shall not be detrimental to the premises. Said fixtures shall remain the property of Lessee, and shall be removed by Lessee upon termination of this lease, and Lessee shall restore the premises to the same condition as that existing at the time of entering into this lease, reasonable wear and tear excepted.

8. DESTRUCTION OF DEMISED PREMISES

If said premises be totally destroyed by fire or other casualty, then this lease shall immediately terminate. In case of partial destruction or damage so as to render the major portion of the demised premises usable, either party may terminate the lease by giving written notice to the other party within fifteen (15) days thereafter, and if so terminated, no rent shall accrue to Lessor after such partial destruction or damage; or if Lessor and Lessee agree, then a reduced rental shall apply on the remaining usable portion or portions of the demised premises, until the partial destruction or damage has been fully and completely repaired by Lessor.

9. SUCCESSORS

Subject to the provisions hereof relating to assignment and subletting, this lease shall bind and inure to the benefit of the successors and assigns of the parties hereto.

10. INDEMNITY

Lessee agrees to indemnify, hold harmless and defend Lessor, and all of the officers, agents and employees of either, from and against all liability for injuries to or deaths of persons or damage to property caused by Lessee's use of, occupancy of, or operations upon the demised premises, provided, however, that this covenant shall not extend to liabilities incurred from any negligent acts or omissions on the part of Lessor and its officers, agents or employees.

Each party hereto shall give to the other prompt and timely written notice of any claim made or suit instituted coming to its knowledge which in any way, directly or indirectly, contingently or otherwise, affects or might affect either, and both shall have the right to participate in the defense of the same to the extent of its own interest.

11. INSURANCE

Lessee shall keep in force during the term of this agreement, at Lessee's expense, liability insurance in companies and through brokers approved by Lessor to protect against liability to the public incident to the use of or resulting from any acts occurring in or about said premises, the liability under said insurance to be not less than Five Hundred Thousand Dollars ($500,000.00) for any one accident and Two Hundred Fifty Thousand Dollars ($250,000.00) for property damage. These policies shall include automobile coverage, where transportation is provided, and shall be provided on comprehensive liability forms, and shall insure the contingent liability of Lessor. Lessee shall furnish Lessor with a certificate of insurance from the carrier of such insurance policy.

The policy of such insurance shall provide that such policy will not be terminated by the insurance carrier on less than thirty (30) days written notice to Lessor. Lessee shall promptly advise, and have the insurance carrier advise Lessor of any changes in, additions to, or termination of any such policy; and upon any termination of such policy, Lessee will forthwith provide a new such policy upon the terms and conditions hereinabove set forth. Lessee shall forthwith notify

Lessor, in writing, with a full description of the facts and with a map or plate attached, of the place, circumstances, nature and results, and names and addresses involved about any occurrences of the demised premises which involve any injury to person or property and will provide Lessor promptly with copies of any claims for damages of any sort, including complaints in any court actions involving such claims.

12. WRITTEN NOTICE

All notices to be given between the parties hereto shall be in writing and may be served by depositing the same in the United States mail, postage prepaid, certified and addressed to Lessor, _____ Unified School District, (insert address), and to Lessee, _____ (insert name and address) or to such other address as either party may designate in writing from time to time.

13. ENTRY AND INSPECTION

Lessee will permit Lessor and its agents to enter into and upon the premises at all reasonable times for the purpose of inspecting the same, or for the purpose of protecting owners' reversions, or to make alterations or additions to the premises or to any other portion of the building in which the premises are situated, or for maintaining any service provided by Lessor to Lessee hereunder. Lessee further will permit Lessor at any time within ninety (90) days prior to the expiration of this lease to bring upon the premises, for purposes of inspection or display, prospective tenants.

14. USES PROHIBITED

The premises shall not be used except for the purposes specified in paragraph 4. Lessee shall not do nor permit anything to be done in or about the demised premises, or any of its contents, which shall in any way conflict with any law, ordinance, rule or regulation affecting the occupancy and use of the premises, which are or may hereafter be enacted or promulgated by any public authority, or in any way obstruct or interfere with the rights of other tenants of the building, nor use, nor allow the premises to be used, for any improper, immoral, unlawful or objectionable purpose.

15. NON-WAIVER OF SUBSEQUENT BREACH

A waiver of a particular breach or default shall not be deemed to be a waiver of any other subsequent breach or default.

16. SURRENDER OF POSSESSION

Lessee accepts the premises with their appurtenances and fixtures in their present condition, and, at the end of the term of this lease, Lessee will surrender the premises in as good order and condition as when received, reasonable wear and tear excepted.

17. NON-DISCRIMINATION

Lessee agrees to abide by (insert non-discrimination statute and/or regulations).

18. LICENSES AND PERMITS

Upon commencement of this lease, Lessee will have possession of the necessary licenses and/or permits required by the _____ Unified School District and the State of, or present indicia that application for such licensure is pending. Lessee agrees to remain a non-profit organization as long as it occupies the demised premises.

19. TERMINATION

It is mutually understood and agreed that in the event that there is a breach or noncompliance with School District policy or procedures by Lessee, Lessor can terminate this lease with a 60-day written notice.

20. HOLDING OVER

Any holding over to the term herein created shall be on a month-to-month basis at the prevailing monthly rental.

IN WITNESS WHEREOF, the parties hereto have executed this lease in triplicate as of the _____ day of _____,198__.

_____. UNIFIED SCHOOL DISTRICT:

By _____

LESSEE:

By _____

BIBLIOGRAPHY

Aronson, Susan. "Injuries in Child Care," Young Children. National Association for the Education of Young Children, Washington, D.C., September 1983.

Baden, Ruth; Genser, Andrea; Levine, James; and Seligson, Michelle. School-Age Child Care: An Action Manual. Boston: Auburn House Publishing Co., Inc., 1982, 486 pages. (Available from The School-Age Child Care Project, Wellesley College, Center for Research on Women, Wellesley, MA 02181 or from Auburn House Publishing Company, Inc., 14 Dedham Street, Dover, MA 02030. $14.95 plus $2.00 postage and handling.)

Child Development Programs Advisory Committee, Child Care Needs of Exceptional Children. Sacramento: State of California, Child Development Programs Advisory Committee, 1600 9th Street, Suite 100, Sacramento, CA 95814, 1983.

Evans, Belle, et al. Day Care: How to Plan, Develop and Operate a Day Care Center. Boston: Beacon Press, 1971.

Garbarino, James. "Latchkey Children: Getting the Short End of the Stick?" Vital Issues, vol. 30, no. 3, November 1980.

Select Committee on Children, Youth and Families. "U.S. Children and Their Families: Current Conditions and Recent Trends." Washington, D.C.: Select Committee on Children, Youth and Families, House of Representatives, 1983.

Seligson, Michelle; Genser, Andrea; Gannett, Ellen; and Gray, Wendy. School-Age Child Care: A Policy Report. Wellesley: School-Age Child Care Project, December 1983. (Available from The School-Age Child Care Project, Wellesley College, Center for Research on Women, Wellesley, MA 02181. $10.00 includes postage and handling.)

"School Facilities Child Care Act" (H.R.4193). Congressional Record, vol. 139, no. 139, 98th Cong., 1st Sess. Washington, D.C.: October 21, 1983.

"School Facilities Child Care Act" (S.1531). Congressional Record, vol. 129, no. 90, 98th Cong., 1st Sess. Washington, D.C.: June 23, 1983.